A

CGU Insurance Bhd v Asean Security Paper Mills Sdn Bhd

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO A–02–338 OF 2000
GOPAL SRI RAM, ALAUDDIN AND ABDUL KADIR SULAIMAN JJCA
15 FEBRUARY 2006

C *Civil Procedure — Appeal — Finding of fact by trial judge — Interference by Court of Appeal — Whether appeal based on factual grounds prevented court from intervening — Whether serious misdirection by trial judge in evaluating witnesses' evidence*

D *Evidence — Witness — Trial judge's rejection of eye-witness account — Whether evidence of witnesses properly evaluated by trial judge — Witnesses without motive — Failure to call important witness warranted adverse inference*

E *Insurance — Fire insurance — Fraudulent claim — Arson — When fire occurred — Whether warehouse was set on fire by arsonists on instructions of respondent — Whether insurer justified in repudiating policy*

F The appellant was the insurer company which as co-insurers issued to the respondent a policy of insurance. The insured subject matter was security paper which was initially stored in Kuala Lumpur and later at a warehouse in Kampong Acheh, Sitiawan. On 11 September 1989, a fire broke out at the Kampong Acheh warehouse. The building and its contents were reduced to ashes. The respondent made a claim on the appellant for the sum insured. The appellant refused to pay. Therefore, the respondent commenced a suit against them. The appellant's defence was that the claim was fraudulent. After a trial at which viva voce evidence was taken, the High G Court found for the respondent. The appellant appealed against that finding. The issue was whether the learned trial judge misdirected himself on the evidence and the facts. The essential points of contention were: (1) the time of the fire. The respondent's case was that the fire occurred only at about 4pm on 11 September 1989. The appellant's case was that the fire started at about 1.30am on 11 September H 1989; and (2) the cause of the fire. The respondent's case was that the fire was spontaneous. The appellant's case was that it was the work of arsonists hired by the respondent. The evidence of the arsonists, DW10 and DW37 and several eye-witnesses were tendered before the court.

I

Held, allowing the appeal:

(1) The fact that an appeal is based on factual grounds does not absolve this court of doing its duty as an appellate court (see para 3). This court would carefully scrutinize the record to see whether there had been a judicial appreciation of

the evidence by the learned trial judge, bearing in mind that the trial judge in this case had acquitted the respondent of fraudulent conduct so that the appellant had to cross an extremely high threshold before it may succeed before this court (see para 7).

(2) Certain salient features of the evidence of the eye-witnesses DW1, DW2 and DW3 were missed or were not properly appreciated by the trial judge. This was therefore a case of a clear misdirection on the evidence of the eye-witnesses. Based on the evidence of DW1, DW2 and DW3, the learned judge ought to have held that the fire occurred during the early hours of the morning of 11 September 1989 and not during any part of the afternoon of that day. On that ground the learned judge ought to have found for the appellant on the issue of the time of the fire. In view of this glaring error on the part of the learned judge his assessment of these witnesses could not be treated as conclusive (see para 26).

(3) When gathered together and considered as a whole, the circumstances set out established beyond a reasonable doubt that the fire was the result of an act of arson. There was no doubt that the warehouse was intentionally set fire to by DW10 and DW37 acting on the instructions of Balasingam on behalf of the respondent and that this was not a case of spontaneous combustion as alleged by the respondent. The respondent's failure to call Balasingam although he was present in court in the circumstances of this case warranted the drawing of an adverse inference under s 114(g) of the Evidence Act 1950 (see para 103).

(4) The evidence, not in isolation but as a whole reasonably supported the conclusion that Balasingam was at all material times acting on the respondent's behalf within condition 13 of the policy. He was acting on behalf of the respondent when he planned the destruction of the warehouse by having DW10 and DW37 to set fire to it. He was also acting on behalf of the respondent when he caused the claim under the policy to be made on the false and fraudulent ground that the fire was the result of spontaneous combustion. The appellant was accordingly entirely justified in repudiating the policy in reliance upon condition 13 (see para 116).

[Bahasa Malaysia summary

Perayu adalah syarikat insurans yang mana sebagai pemberi insurans bersama telah mengeluarkan kepada responden satu polisi insurans. Perkara pokok yang diinsuranskan adalah kertas keselamatan yang pada mulanya disimpan di Kuala Lumpur dan kemudian di gudang di Kampung Acheh, Sitiawan. Pada 11 September 1989, satu kebakaran berlaku di gudang Kampung Acheh itu. Bangunan dan barangan dalamnya musnah terbakar. Responden telah membuat tuntutan terhadap perayu untuk jumlah yang diinsuranskan. Perayu enggan membayar. Oleh itu, responden telah memulakan guaman terhadap mereka. Pembelaan perayu adalah bahawa tuntutan itu berunsur fraud. Selepas perbicaraan di mana keterangan viva voce diambil, Mahkamah Tinggi menyebelahi responden. Perayu telah merayu terhadap penemuan itu. Persoalannya adalah sama ada hakim perbicaraan yang bijaksana telah salah arah atas keterangan dan fakta. Perkara penting yang dihujahkan adalah: (1) masa kebakaran. Kes responden adalah bahawa kebakaran hanya berlaku

A lebih kurang pukul 4pm pada 11 September 1989. Kes perayu adalah bahawa kebakaran berlaku lebih kurang pukul 1.30 pagi pada 11 September 1989; dan (2) punca kebakaran. Kes responden adalah bahawa kebakaran berlaku secara spontan. Kes perayu adalah bahawa ia adalah kerja orang yang membakar dengan sengaja yang telah diupah oleh responden. Keterangan orang yang membakar dengan B sengaja itu, DW10 dan DW37 dan beberapa orang saksi kejadian telah dikemukakan di mahkamah.

Diputuskan, membenarkan rayuan tersebut:

C

(1) Fakta bahawa satu rayuan adalah berdasarkan alasan faktual tidak membebaskan mahkamah ini daripada melaksanakan kewajipannya sebagai mahkamah rayuan (lihat perenggan 3). Mahkamah ini telah meneliti rekod itu untuk melihat sama ada terdapat kesedaran kehakiman tentang keterangan oleh hakim perbicaraan yang bijaksana, dengan mengambil kira bahawa hakim D perbicaraan dalam kes ini telah membebaskan responden daripada perlakuan berunsur fraud agar perayu terpaksa melepasi halangan sebelum boleh berjaya di hadapan mahkamah ini (lihat perenggan 7).

(2) Ciri-ciri penting tertentu berhubung keterangan saksi kejadian DW1, DW2 dan DW3 telah terlepas perhatian atau tidak diteliti dengan betul oleh hakim E perbicaraan. Ini merupakan satu kes salah arah yang nyata tentang keterangan saksi kejadian. Berdasarkan keterangan DW1, DW2 dan DW3, hakim perbicaraan yang bijaksana sepatutnya memutuskan bahawa kebakaran tersebut berlaku awal pagi 11 September 1989 dan bukan pada waktu tengah hari. Atas alasan itu, hakim yang bijaksana sepatutnya menyebelahi perayu F berhubung persoalan tentang masa kebakaran. Berdasarkan kesilapan yang nyata ini di pihak hakim yang bijaksana, penilaian beliau tentang saksi-saksi tersebut tidak boleh dianggap sebagai konklusif (lihat perenggan 26).

(3) Apabila dikumpulkan semuanya dan dipertimbangkan secara keseluruhan, keadaan yang ditetapkan membuktikan melampaui keraguan munasabah G bahawa kebakaran tersebut adalah akibat perbuatan membakar harta dengan sengaja. Tiada keraguan bahawa gudang tersebut telah dibakar dengan sengaja oleh DW10 dan DW37 yang bertindak atas arahan Balasingam bagi pihak responden dan ia bukan satu pembakaran spontan seperti yang dikatakan oleh responden. Kegagalan responden memanggil Balasingam meskipun beliau H hadir di mahkamah dalam keadaan kes ini mewarankan satu andaian yang memudaratkan di bawah s 114(g) Akta Keterangan 1950 (lihat perenggan 103).

(4) Keterangan tersebut, bukan secara berasingan tetapi secara menyeluruh menyokong kesimpulan bahawa Balasingam adalah pada setiap masa matan I bertindak bagi pihak responden menurut syarat 13 polisi. Beliau bertindak bagi pihak responden apabila beliau merancang memusnahkan gudang itu dengan menyuruh DW10 dan DW37 membakarnya. Beliau juga bertindak bagi pihak responden apabila beliau menyebabkan tuntutan di bawah polisi itu dibuat berdasarkan alasan yang palsu dan berunsur fraud yang mana kebakaran

itu adalah akibat pembakaran spontan. Perayu sewajarnya dijustifikasikan dalam mengingkari polisi itu yang bergantung pada syarat 13 (lihat perenggan 116).]

Notes

For a case on finding of fact by trial judge, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index para 934.

For a case on trial judge's rejection of eye-witness account, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index para 2672.

For cases on fraudulent claim under fire insurance, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 108–110.

Cases referred to

AEG Carapiet v AY Derderian AIR 1961 Cal 359 (refd)
Akerhielm v De Mare [1959] AC 789 (refd)
Ang Hiok Seng @ Ang Yeok Seng v Yim Yut Kiu (Personal Representative of the Estate of Chan Weng Sun, deceased) [1997] 2 MLJ 45 (refd)
Bhogilal v Royal Insurance Co Ltd AIR 1928 PC 54 (refd)
Coghlan v Cumberland [1898] 1 Ch 704 (refd)
Dato' Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232 (refd)
Fun Seong Cheng v PP [1997] 3 SLR 523 (refd)
Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1 (refd)
Gooi Loo Seng v Public Prosecutor [1993] 2 MLJ 137 (refd)
Gulwant Singh v Abdul Khalik [1964] MLJ 286 (refd)
HL Bolton (Engineering) Ltd v TJ Graham & Sons Ltd [1956] 3 All ER 624
Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor [1995] 3 MLJ 369 (refd)
Khoon Chye Hin v PP [1961] MLJ 105 (refd)
Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97 (refd)
M Ratnavale v S Lourdenadin [1988] 2 MLJ 371 (refd)
Malaysia National Insurance Sdn Bhd v Malaysia Rubber Development Corporation [1986] 2 MLJ 124 (refd)
Meridian Global Funds Management Asia Ltd v Securities Commission [1995] 3 All ER 918 (refd)
New India Assurance Co Ltd v Shakuntalabai AIR 1987 MP 244 (refd)
Nicholls v The Queen [2005] HCA 1 (refd)
O'Brien v Chief Constable of South Wales Police [2005] UKHL 26; [2005] 2 All ER 931 (refd)
PP v Datuk Haji Harun bin Haji Idris (No 2) [1977] 1 MLJ 15 (refd)
Preshyon v Cooperators General Insurance Company (1991) 103 NSR (2d) 189 (refd)
R v Edwards [1991] 2 All ER 266 (refd)
Ratna Ammal v Tan Chow Soo [1966] 2 MLJ 294 (refd)
Revella Sivaiah v State of Andhra Pradesh [2005] Cr LJ 526 (refd)
Ruxley Electronics and Construction Ltd v Forsyth [1994] 3 All ER 801 (refd)
Satpaul v Delhi Administration AIR 1976 SC 294 (refd)
Seth Maganmal v Darbarilal AIR 1928 PC 39 (refd)
Stamper v Griffin 1856, 20 Ga 312 (refd)
Tan Chow Soo v Ratna Ammal [1969] 2 MLJ 49 (refd)
Thag Services Inc (M) Sdn Bhd v Capital Insurance Bhd [1989] 2 CLJ 504 (refd)

A *Tengku Mahmood v PP* [1974] 1 MLJ 110 (refd)
Vijayan v State AIR 1999 SC 1311 (refd)
Watt v Thomas [1947] AC 484 (refd)
Wood v Van Rensburg [1921] CPD 36 (refd)
YK Fung Securities Sdn Bhd v James Capel (Far East) Ltd [1997] 2 MLJ 621 (refd)

B **Legislation referred to**
Evidence Act 1950 ss 8, 145(1), 153, 155(c), 157
Evidence Act 1872 [India] s 67

C *Porres P Royan (Dato' Anad Krishnan, T Sudharsanan and Michael Lum with him) (Shook Lin & Bok) for the appellant.*
A Mahendran (Stanislaus with him) (CK Leong & Co) for the respondent.

D **Gopal Sri Ram, Abdul Kadir Sulaiman and Alauddin JJCA (delivering joint judgment):**

INTRODUCTION

E **[1]** There are three appeals before us. The parties have agreed to go forward on only this one. That is because the result of this appeal will determine the event of the others. We will now address the facts very briefly.

F **[2]** The appellant is the successor in title to Commercial Union Assurance (M) Sdn Bhd. In July 1989, Commercial Union Assurance (M) Sdn Bhd and a company called Provincial Insurance (M) Sdn Bhd ('Provincial') as co-insurers issued to the respondent a policy of insurance. Provincial is the appellant in one of the other appeals, W–02–29 of 2000. The sum insured was initially RM14.932m. In August 1989 it was increased to RM32.431m. According to the policy, the insured subject matter was security paper which was initially stored in Kuala Lumpur and later at a warehouse in Kampong Acheh, Sitiawan. For the purposes of this appeal, we will treat it as if it was the appellant who issued the policy as that is the position taken by all before us. On 11 September 1989, a fire broke out at the Kampong Acheh warehouse. The building and its contents were reduced to ashes. The respondent made a claim on the two insurance companies for the sum insured. The appellant and Provincial refused to pay. So the respondent commenced a suit against them. The appellant's defence was that the claim was fraudulent. After a trial at which viva voce evidence was taken, the High Court found for the respondent. The appellant and Provincial have appealed against that finding.

G

H

APPELLATE APPROACH

I **[3]** It is common ground between Mr Mahendran of counsel for the respondent and Mr Royan of counsel for the appellant that this appeal turns solely on questions of fact. But the fact that an appeal is based on factual grounds does not absolve this court of doing its duty as an appellate court. And that duty was summed up by Lindley MR in *Coghlan v Cumberland* [1898] 1 Ch 704 as follows:

> Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong. When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross examined before the judge, the court is sensible of the great advantage he has had in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions: and when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen.

[4] The issue in the present appeal is whether the learned trial judge misdirected himself on the evidence and the facts. In short, whether there was judicial appreciation or evaluation of the evidence by the trial judge.

[5] Not very long ago, in *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97, we formulated the following test warranting appellate intervention:

> Suffice to say that we re-affirm the proposition that an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence. It is, we think appropriate that we say what judicial appreciation of evidence involves.
>
> A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness, test it against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence. If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case. A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness' evidence runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case: the approach to judicial appreciation of evidence is the same.

[6] When the matter went on further appeal to the Federal Court in *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1, counsel criticised the approach we had taken, suggesting that we had set for ourselves a test different from that laid down in the authorities on the subject. The Federal Court rejected that argument. Steve Shim CJ (Sabah & Sarawak) who delivered the judgment of the court said this (at pp10–11):

A In our view, the Court of Appeal in citing these cases had clearly borne in mind the central feature of appellate intervention, ie to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. In so doing, the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court. Clearly, the phrase 'insufficient judicial appreciation of evidence' merely related to such a process. This is reflected in the Court of B Appeal's restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention, ie that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside C on appeal. This is consistent with the established plainly wrong test.

In the circumstances and for the reasons stated, there is no merit in the appellants' contention that the Court of Appeal had adopted a new test for appellate intervention. In our view, what the Court of Appeal had done was merely to accentuate the established plainly wrong test consistently applied by the appellate courts in this country.

D

[7] This is the identical approach we shall adopt in this appeal. We propose to carefully scrutinise the record to see whether there has been a judicial appreciation of the evidence by the learned trial judge. And we do so bearing in mind that the trial judge in this case had acquitted the respondent of fraudulent conduct so that the E appellant has to cross an extremely high threshold before it may succeed before us. As observed by Lord Jenkins who delivered the Advice of the Privy Council in *Akerhielm v De Mare* [1959] AC 789:

Suffice it to say that their Lordships are satisfied that this is not one of those exceptional cases in which an appellate court is justified in reversing the decision of the judge at first F instance when the decision under review is founded upon the judge's opinion of the credibility of a witness formed after seeing and hearing him give his evidence (see as to this *The Hontestroom* [1927] AC 37; *Watt (or Thomas) v Thomas* [1947] AC 484; *Yuill v. Yuill* [1945] P15; *Benmax v Austin Motor Co Ltd* [1955] AC 370). Their Lordships can hardly imagine a case in which the credibility of a witness could be more vital than a case like the G present where the claim is based on deceit, and the witness in question is one of the defendants charged with deceit. Their Lordships would add that they accept, and would apply in the present case, the principle that *where a defendant has been acquitted of fraud in a court of first instance the decision in his favour should not be displaced on appeal except on the clearest grounds* (see *Glasier v Rolls* (1889) 42 ChD 436, 457). (Emphasis added.)

H ANALYSIS OF THE FACTS AND EVIDENCE

[8] We begin with the three essential points in the respective parties' case as presented in the court below. First, the time of the fire. The respondent's case is that the fire occurred only at about 4pm on 11 September 1989. The appellant's case is I that the fire started at about 1.30am on 11 September 1989. Second, the cause of the fire. The respondent's case is that the fire was spontaneous. The appellant's case is that it was the work of arsonists hired by the respondent. Third, the nature of the policy in question. The respondent's case is that it is a valued policy. The appellant's case is that it is an unvalued policy.

[9] We must mention here that at the trial, the respondent began. At the close of the respondent's case, the appellant presented evidence intending to prove that the claim was fraudulent. At the close of the appellant's case, the respondent, very properly, and with the leave of the court, re-opened its case and called rebuttal evidence. At the conclusion of the trial, the learned trial judge found for the respondent on all the essential issues. We find it convenient to deal with the first two issues, namely the time of the fire and its cause together. Once we have expressed our concluded view on these two issues, we will discuss the judge's finding on the issue whether there was here a valued or an unvalued policy.

THE TIME AND CAUSE OF THE FIRE

[10] The evidence about the fire comes from two principal sources. First, the testimony of the witnesses who saw the fire; second, the arsonists themselves.

(i) The eye-witnesses

[11] DW1 was Lance Corporal Tun Puteh bin Samah. A summary of his evidence in chief is as follows. At the material time he was attached to the Marine Police at Sitiawan. At about 12.01am on 11 September 1989, he came on duty at the Marine Police compound. He maintained a diary in which he made entries. At about 1.30am on the same day he saw smoke and a glow at a distance of about ¼km away from his post. He knew it came from the area in which the respondent's warehouse was located. At 4am, he came off duty after handing over to the next personnel. He rested. Then at 8.30am he returned to his home in Sitiawan. He rode a motor cycle. He passed the respondent's warehouse and saw that it had burned down. But there was still a lot of smoke. He confirmed that he had seen the warehouse before its destruction. Under cross examination he confirmed that he had not made a note of the fire in his diary. He gave a reason for that omission. The fire had been far away and not inside the Marine Base. He did not call the fire brigade because he knew that the respondent's warehouse had a guard who would make the call. He denied a suggestion that he had been offered a bribe to give a statement. There does not appear to have been any suggestion made that the witness' memory was faulty about the date of the fire or that he was not telling the truth.

[12] The trial judge dealt with DW1's evidence in the following way:

> DW1 — L/Kpl 74783 Tun Putih bin Samah stated that he saw smoke and a glow on the morning of 11 September 1989, and noticed the burned down warehouse. He made no note in his diary, and did not call the fire brigade, nor inform the police.

[13] In a later passage in his judgment, he made the following omnibus finding about all the eye-witnesses called by the appellant:

> That all the defence witnesses saw the remains of a gutted building is probable, as there is no dispute that the warehouse did burn down on 11 September 1989. However, some of the witnesses did not remember the actual date on which they saw the gutted warehouse.
>
> This is very reasonable. The event took place ten years ago. As for those who stated that they saw the gutted down warehouse on the morning of 11 September 1989, it appears to me

A too far fetched for them to remember the exact date after 10 years. None of them who stated that they saw the gutted down warehouse on 11 September 1989 have given a reasonable and credible reason, as for how, and why, they could remember exactly the date on which they saw the gutted down warehouse. Most of them alleged that they were going about their daily business and had nothing in my view, to have actual interest in the event, except to observe a gutted down warehouse.

B Therefore, it is in my considered view that those witnesses who stated that they saw the gutted down warehouse on the morning of 11 September 1989 were either lying, or have failed to convince me satisfactorily as to how they could remember the exact date of the incident after a lapse of ten years.

C **[14]** As may be seen, the trial judge's treatment of this witness is cursory. DW1 was a policeman who had no interest in the subject matter of the litigation. He was a non-partisan witness. The crucial question that the learned judge overlooked asking himself was this: what possible motive would DW1 have to tell a lie about the time of the fire? Certainly none was suggested to him by counsel who cross examined him. In *Tengku Mahmood v Public Prosecutor* [1974] 1 MLJ 110, the sessions court had D accepted the complainant as a witness of truth acting purely on demeanour. The High Court reversed mainly because the trial court had not judicially appreciated the evidence of the witness. In particular, the trial court had not considered the issue of motive. Raja Azlan Shah FJ (as His Highness then was) there said (at p 110):

E

The central question to be considered in this appeal is whether on the record, as it stands, the learned president was right in accepting the complainant as a witness of truth.

As regards authority, there is, I think, very little to be said. It is hardly necessary to go further back than *Tara Singh v Public Prosecutor* [1949] MLJ 88, at p 89 in 1948. In that case it was held that impression as to demeanour of a witness must be critically tested against the F totality of his evidence. Now, the learned president, it is true, had a great advantage over this court. He saw and heard the witness and I did not. But the demeanour is not always the touch-stone of truth. It is only one ingredient in arriving at a finding of credibility. But so also is motive....

G **[15]** Further, as earlier pointed out, it had never been suggested to the witness under cross examination that he was mistaken about the date or time of the fire. In such circumstances, it is our respectful view that the learned judge erred in labelling DW1 (if the omnibus finding included him) as a liar or as a witness with a faulty memory. It follows that there was insufficient judicial appreciation of this H witness' evidence. Had the learned judge asked himself the right question and addressed his mind to the totality of this witness' evidence, he would have come to the conclusion that DW1 was a truthful witness. In our judgment he should have so found. His approach to the evidence of DW1 is accordingly a serious misdirection.

I **[16]** Next there is the evidence of DW2, Zainuddin bin Zain, a driver in the Fisheries Department. The gist of his evidence is that he sends his children to school along a route that takes him by the respondent's warehouse. On 11 September 1989, at about 7.10am as he was passing along his usual route, he saw that the respondent's building had burned down. He kept a diary in which he noted down what he saw. The diary was produced in evidence as exh D47 and the relevant entry was marked

as D47A. Under cross examination, this witness denied that he had invented the diary (exh D47) for the purpose of this case. He also denied that he had been paid anything by the appellant's representatives. He confirmed that the diary had been seized by the police. Under re-examination, this witness confirmed that the entries in exh D47 were in his handwriting.

[17] The learned judge's reference to this witness is in the following terms:

> DW2 — Zainuddin bin Zain also stated he saw that the warehouse had been burned down, but did not state the date. *He also made no note in his diary*, informed neither the Bomba nor the police department and lodged a report. (Emphasis added.)

Apart from this there is the omnibus summary of the learned judge's views on the eyewitnesses which we have already produced earlier in this judgment.

[18] We have read and re-read the evidence of DW2 and nowhere is there any admission by him that he did not maintain a diary. Quite the opposite. The learned judge's evaluation and rejection of this witness' evidence is therefore based on an incorrect premise. It is flawed and cannot stand. Further, we find nothing in the cross-examination of this witness to suggest that the building was upright and standing at 7.10am because the fire (according to the respondent's version) did not occur until much later. The failure to put this essential part of its case to this witness strongly favours the conclusion that the witness' account as to the time at which he saw the building in cinders was accepted by the respondent.

[19] As for authority, we need go no further than the judgment of Mukharji J in *AEG Carapiet v AY Derderian* AIR 1961 Cal 359 referred to and applied by this court in *YK Fung Securities Sdn Bhd v James Capel (Far East) Ltd* [1997] 2 MLJ 621 speaking through Mahadev Shankar JCA (at pp 659–660):

> The law is clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprise at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is being made comes to give and lead evidence by producing witnesses. It has been stated on high authority of the House of Lords that this much a counsel is bound to do when cross-examining that he must put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness or in which that witness had any share. If he asked no question with regard to this, then he must be taken to accept the plaintiff's account in its entirety. Such failure leads to miscarriage of justice, first by springing surprise upon the party when he has finished the evidence of his witnesses and when he has no further chance to meet the new case made which was never put and secondly, because such subsequent testimony has no chance of being tested and corroborated.

[20] Further, once it is accepted; as it must be; that DW2 did keep a diary and made the entries in it, the entry exh D47A is admissible to show consistency and truth under s 157 of the Evidence Act 1950. The proper way in which the section

is to be applied was stated by Raja Azlan Shah FJ (as His Highness then was) in *Karthiyayani & Anor v Lee Leong Sin & Anor* [1975] 1 MLJ 119 as follows (at p 120):

> In my judgment, the finding of the learned judge shows that certain salient features of this aspect of the evidence were missed or were not properly appreciated. It is settled law that a person cannot corroborate himself but it would appear that s 157 of the Evidence Act enables a person to corroborate his testimony by his previous statement. The section adopts a contrary rule of English jurisprudence by enacting that a former statement of a witness is admissible to corroborate him, if the former statement is consistent with the evidence given by him in court. The rule is based on the assumption that consistency of utterance is a ground for belief in the witness's truthfulness, just as inconsistency is a ground for disbelieving him. As for myself, although the previous statement made under s 157 is admissible as corroboration, it constitutes a very weak type of corroborative evidence as it tends to defeat the object of the rule that a person cannot corroborate himself. In my opinion the nature and extent of corroboration necessary in such a case must depend on and vary according to the particular circumstances of each case. What is required is some additional evidence rendering it probable that the story of the witness is true and that it is reasonably safe to act upon it. If a witness is independent, ie, if he has no interest in the success or failure of a case and his evidence inspires confidence of the court, such evidence can be acted upon. *A witness is normally to be considered independent unless he springs from sources which are likely to be tainted.* If there are circumstances tending to affect his impartiality, such circumstances will have to be taken into account and the court will have to come to a decision having regard to such circumstances. The court must examine the evidence given by such witness very carefully and scrutinise all the infirmities in that evidence before deciding to act upon it.
>
> The nature and extent of corroborative evidence is a factor which should have been weighed by the learned judge. But as far as I can see, he did not mention it. (Emphasis added.)

[21] Nowhere in his judgment has the learned judge addressed these issues. Neither is there any reason given as motive for this witness — a person coming from an untainted source — to be untruthful to the court. We are satisfied that if the trial judge had addressed his mind to relevant considerations in relation to this witness, he would and ought to have accepted his evidence. His failure to do so amounts to a serious misdirection.

[22] Next is the evidence of DW3. He is an officer with the Fisheries Department at Kampong Acheh. His evidence in chief is as follows. On the morning of 11 September 1989, while it was still dark, he was sending his wife to her place of work at Sitiawan as he usually did. He had to pass the site of the respondent's warehouse. He saw the embers of a fire and some smoke coming from the respondent's warehouse. After dropping his wife he returned at about 7am. It had become bright by then and he saw the respondent's warehouse burnt down. He was familiar with the place as he had seen it before. On arrival at work, he met DW2 who told him that he had also seen that the building in question had burned down. Under cross-examination, he confirmed that he had not lodged a police report for two reasons: because it was not his business and because there would be a guard at the site. He denied that anyone had offered him any inducement to tell lies in court. He denied the suggestion that he was not telling the truth. But it is noteworthy that counsel for the respondent did not specifically challenge this witness' account as to the time at which he had seen the building in cinders.

[23] Apart from his omnibus summary of his views on the evidence of the eye-witnesses which we have already set out, the learned judge's comment on this witness is as follows:

> DW3 — Mutaza bin Yeop Wasir stated that on 11 September 1989 at about 7am, he saw fire and smoke coming from the warehouse, but under cross-examination, he stated that he was not sure of the date.

[24] We have read and re-read the evidence of DW3 under cross-examination but are unable to find any statement by him that he was unsure of the date of the fire. Indeed, such a suggestion was never made to this witness during cross-examination. It is therefore our respectful view that there was a serious failure on the part of the judge to appreciate the evidence of this witness.

[25] To sum up, all the eye witnesses were truly independent persons. Accordingly, their evidence deserved to be given due weight. Nowhere in his judgment did the learned judge ask himself as to the possible motive these witnesses would have to concoct a story about the time of the fire. And, as we have demonstrated, in the case of each eye-witness the learned judge erred in appreciating his evidence, making serious errors as to what each witness said or did. In a case such as this we can do no better than to recollect what Raja Azlan Shah FJ (as His Highness then was) said about the duty of a trial judge and that of an appellate court in *Tengku Mahmood v Public Prosecutor* [1974] 1 MLJ 110 (at p 110):

> As regards authority, there is, I think, very little to be said. It is hardly necessary to go further back than *Tara Singh v Public Prosecutor* [1949] MLJ 88, at p 89 in 1948. In that case it was held that impression as to demeanour of a witness must be critically tested against the totality of his evidence. Now, the learned president, it is true, had a great advantage over this court. He saw and heard the witness and I did not. But the demeanour is not always the touch-stone of truth. It is only one ingredient in arriving at a finding of credibility. But so also is motive. …. It is for this reason that a judge of fact should always test the complainant's evidence against the totality of his evidence and the probabilities of the case. Failure to do so does amount, in my view, to a misdirection, and if it can be demonstrated that the trial judge had failed to do that, his conclusion as to credibility, cannot, in justice, be regarded as impeachable, much less unimpeachable. It would therefore be not just for an appellate court to regard itself as compelled to regard as conclusive his finding on the issue of credibility. The whole matter can be considered afresh.

[26] At the risk of repetition, we would say this. In our view, certain salient features of the evidence of the eye-witnesses were missed or were not properly appreciated. This is therefore a case of a clear misdirection on the evidence of the eye-witnesses. A reasonable tribunal properly directing itself on the evidence of the eyewitnesses would have found that the respondent's version that the fire occurred only at 4pm on 11 September 1998 could not on a balance probabilities be true. In our judgment, based on the evidence of DW1, DW2 and DW3, the learned judge ought to have held that the fire occurred during the early hours of the morning of 11 September 1989 and not during any part of the afternoon of that day. On that ground the learned judge ought to have found for the appellant on the issue of the time of the fire. In view of this glaring error on the part of the learned judge his assessment of

these witnesses cannot be treated as conclusive. With that we now turn to the next set of witnesses, the arsonists.

(ii) The evidence of the arsonists

[27] The two arsonists who gave evidence were DW10 and DW37. We will deal with each separately.

[28] The gist of DW10's evidence in chief is that he and one Matthew set fire to the respondent's warehouse on the instructions of one Captain Balasingam whose relationship with the respondent company will be discussed later in this judgment. According to DW10 Captain Balasingam wanted the paper burnt because it was of poor quality and he wanted to make a claim on the insurance company. Captain Balasingam took steps to have the warehouse guard Muniandy drugged with a dose of sleeping tablets mixed in a beverage. The witness described at some length the way in which about eight or nine persons, including himself scattered the paper about the warehouse and the way in which the arson was committed.

[29] Under cross-examination, DW10 was confronted with a statutory declaration dated 1 August 1990 (marked as exh P50) said to be made by him. Its contents contradicted DW10's evidence on oath. A *voir dire* was conducted. DW10 denied having signed P50 although he admitted that the signature on it was his. His evidence is that he merely signed a blank sheet of paper. In other words, he challenged the genuineness of P50 as a document. The learned judge admitted P50 in evidence and held that DW10's credit had been impeached and disregarded it. This is what he said about it:

> Wilfred Silva — (DW10) worked for plaintiffs' company at the relevant period. He stated in detail how on 8 September 1989, he and a number of employees were asked by Mr Balasingam to throw papers all over the warehouse including the roof beams. According to him the exercise was executed to fulfill Mr Balasingam's grand design to set fire to the warehouse subsequently. He had prior to that, driven to Sitiawan. On the way he stopped at Pusing where he, Mr Balasingam and one Matthew Selvarajah a fellow employee, were told by Mr Balasingam to set fire to the warehouse. Mr Balasingam also gave them each a cigarette lighter that he had purchased in Pusing. Mr Balasingam told this witness that he wanted them to set fire to the warehouse in order to make a claim from the Insurance Company. At Pusing, Mr Balasingam also purchased a tin of condensed milk in order to give a drink with some sleeping tablets to the watchman at the warehouse, in order to put him to sleep.
>
> Apart from scattering and throwing paper in the warehouse, the goods were rearranged. After that most of the workers left and the guard was given a drink by Mr Balasingam to make him drowsy. Mr Balasingam left the warehouse at about 1am on 11 September 1989 with Mr Simon Ho who was another employee of the plaintiffs' company.
>
> After Mr Balasingam had left, DW10 together with Matthew Selvarajah — (DW37) entered the warehouse, and proceeded to set fire to the loose paper thrown about in the warehouse. After that they closed the door of the warehouse, and they then proceeded in a car to Kuala Lumpur. On the way, Matthew Selvarajah — (DW37) informed Mr Balasingam in a coded message that the plan to set fire to the warehouse and its contents had been implemented. Both DW10 and DW37 stayed in Kuala Lumpur for a week.

Under cross-examination, witness stated that he worked for Ringgit Rental Car for about eight months from early 1989. He was also the Managing Director of Bright Force Sdn Bhd, but stated he was as a sleeping partner, and later left his job. He stated his boss Mr Balasingam was strict but a good boss, and did odd jobs for Mr Balasingam. He also admitted he was a bankrupt.

Witness admitted making a Statutory Declaration (ID50) dated 1 September 1990 but denied signing it in the presence of a Commissioner for Oaths, Mr Huang Tzu Ching — (TWT1). He also admitted signing an affidavit (P51) on 22 November 1989 but not before Mr Kala Singh — (TW18) who is also a Commissioner for Oaths. Apart from this document, he stated that he had given the police two statements, the first of which was an accurate statement.

The Impeachment Of DW10's Evidence

Counsel for the plaintiffs, Mr Philip Leong then applied to impeach the credit of this witness in regard to his having made a statutory declaration — (ID50) and an affidavit (P51) the contents of which differed materially from his evidence in court. Before I consider ID50, I have to make a ruling whether it is admissible on the evidence adduced in court. That ID50 is not the original of the document is not disputed. It is alleged that the original was with the deponent — DW10, although DW10 denied receiving the original. Secondly, the defendants argued that the signature on ID50 was transferred from another document on to ID50.

The defendants' witness Mr Siow Kwen Sia — (DW34) who is a Forensic Document Analyst stated that whether a signature on a document has been transferred on to it, or not, can only be determined if the original of the document was available. DW34 further confirmed under cross-examination that he was not asked to make a finding whether the signature on ID50 was a forgery, and neither did he determine so. In fact, he went on further to state that the signature on ID50 could be genuine. He stated he had never met DW10, and he was told that the signature of DW10 could possibly be lifted from another document into ID50.

Apart from DW34's evidence, the police report lodged by DW10 — (P57) is relevant. This report stated that when DW10 signed the document ie, ID50, it was blank. The report was lodged by DW10 in the course of certain criminal proceedings. DW34 was not informed about the contents of the report P57.

Having reviewed all the evidence, I am of the view that ID50 is admissible and therefore it is now marked as P50. Firstly, the original is no longer traceable. Secondly, the deponent does not deny signing a document, except that he denies the contents were therein when he signed P50. Again the commissioner for oaths Mr Huang Tzu Ching stated in evidence that the statutory declaration was signed in his presence by DW10, and Mr Huang's chop also appears in the document. In fact Mr Huang stated that he was familiar with DW10 as he used to sign documents in his presence in his office, and other places. In fact Huang stated categorically that he would not sign any document which was not attested before him, and he had never attested any document in the absence of the declarant.

DW10 also denied signing an affidavit before Mr Kala Singh, a Commissioner for Oaths on 1 August 1990. He alleged that he signed it in front of Mr Balasingam and Mr Matthew Selvarajah — (DW37). However Mr Kala Singh stated quite categorically in evidence that he attested the signature of DW10 in the presence of DW10, and also put his chop on the exh P51. Mr Kala Singh a very senior experienced retired interpreter had no reason to lie. He stated that he was duty bound to ensure that a deponent was before him when the affidavit was affirmed.

The contents of P50 are in total variation with the evidence given by DW10 in court. In P50, he stated that on 10 September 1989 between 2pm and 7pm, he was with one

A Mr Matthew Selvarajah at his residence at Ipoh Garden East Ipoh, and that he and Matthew Selvarajah did not leave the house at all during that period. He also stated that he never met Mr Balasingam at any place or time during 9 to 11 September 1989 and neither did he speak to him on the telephone during that period.

In P57, which is a police report lodged by DW10 on 20 December 1993, he stated that he had signed P50 but when he signed it, it was blank in regard to para. A to E.

B

Bearing in mind the complete and total contradictions in the evidence of DW10 in court vis a vis the contents of P50 and evidence relating to P57, and having heard all the evidence, I hold as a fact that whatever explanation given by DW10 in regard to the material contradictions is not valid.

C Having heard the evidence of Mr Kala Singh and Mr Huang Tzu Ching, I have no reason to doubt the veracity of their evidence. I therefore hold that the evidence of DW10 stands impeached.

[30] Before us, the admissibility of exh P50 was attacked. So was the learned judge's finding of impeachment. We will deal with the issue of admissibility first. Some recitation of the evidence is necessary for this purpose.

D

[31] When exh P50 was first shown to DW10, he denied signing it although he acknowledged the signature on exh P50 to be his. He also denied having signed it in the presence of Mr Huang, the commissioner for oaths. Mr Huang gave evidence that DW10 signed exh P50 in his presence in the office and in the presence of Mr CK Leong, the respondent's solicitor. However, Mr CK Leong did not give evidence to confirm this fact. There are also two other aspects of Mr Huang's testimony that requires mention. In the first place, he admitted quite frankly that he was unable to say whether exh P50 was the very statutory declaration that DW10 signed in Mr CK Leong's office or whether it was some other statutory declaration that was signed on the occasion in question. This statement by this witness assumes importance because he had in his evidence in chief accepted that DW10 had signed other documents in his presence on other occasions. In the second place, exh P50 carries a rubber stamp of DW10's name on its face. Mr Huang's evidence is that when DW10 signed exh P50, he did not place the rubber stamp mark that now appears on that document. Mr Huang was later recalled and said that he handed the original of exh ID50 and certified copies of it to DW10 a fact denied by DW10.

E

F

G

[32] The important question for the learned judge to resolve as a first step when dealing with the issue of impeachment was whether exh P50 had been proved. Because, 'unless such statement was proved the first step in the procedure for the impeachment of the credit of a witness was not passed. See *Muthusamy v Public Prosecutor* [1948] MLJ 57 ' per Karthigesu JA in *Fun Seong Cheng v Public Prosecutor* [1997] 3 SLR 523. Since it was the respondent who was seeking to use exh P50 to impeach DW10, it was for it to prove the genuineness of that document once the witness denied making it. For, as Benning J said in *Stamper v Griffin* 1856, 20 Ga 312 at p 320:

H

I

A writing of itself is not evidence of one thing or the other. A writing of itself is evidence of nothing, and therefore, is not, unless accompanied by proof of some sort, admissible as evidence.

[33] If you look at *Sarkar on Evidence* (15th Ed) (Reprint 2002), p 1115, you will find the foregoing passage being expressly approved as illustrating the principle expressed in s 67 of the Indian Evidence Act 1872 which is in pari materia with our provision. A

[34] So the learned judge had to make a specific finding that exh P50 was a genuine document since its authenticity was disputed. It would be genuine if it was either the original or a certified true copy of the original signed by DW10 before Mr Huang on 1 August 1990. This is important because central to the procedure laid down by s 145(1) of the Evidence Act 1950, is the proposition that a witness may only be confronted with a genuine previous inconsistent statement. For no person may be contradicted by an alleged previous statement which is not proved to be genuine. Accepting as accurate Mr Huang's evidence that the declaration which DW10 signed before him on 1 August 1990 did not carry a rubber stamp as does exh P50, then exh P50 is not a true copy of the document signed by DW10 on 1 August 1990. If it was not, then no question of impeachment could arise since the document had not been proved. In this respect, Mr CK Leong's evidence would have been most useful as it was the respondent's case that he was present when DW10 allegedly signed exh P50. Put at its highest, his failure to give evidence, though he was available certainly warrants the drawing of an inference that if he had given evidence, his testimony would have been adverse to the respondent. Put at its lowest, his failure to give evidence leaves a gap in the respondent's evidence in respect of the proof of the genuineness of exh P50. B C D E

[35] The other document which the learned judge relied on for impeaching DW10's evidence (as may be seen from the passage in his judgment quoted earlier) is exh P51. It is an affidavit of service. DW10 did not deny executing it. He merely said that he did not sign it in the presence of Mr Kala Singh, a commissioner for oaths but instead signed it in the presence of Captain Balasingam and Matthew. At no time was it suggested to DW10 that the contents of the affidavit of service contradicted his evidence in court. How could it? It had nothing to do with anything the witness had testified to. With respect to the learned judge we think he erred on this point. F G

[36] Impeachment of a witness has to do with the contents of a statement he or she made and not its execution. One of the grounds on which a witness may be cross examined as to his or her credit is because of what he or she said on a previous occasion. This is what s 155(c) of the Evidence Act 1950 is all about. But that is not the situation here. Here we have a witness, DW10, who admits signing a document but says that the execution took place before X and not Y. Whether that is the truth or not is a matter that goes to his credibility as a witness. It has nothing to do with his credit. DW10's credibility is something that the learned judge as a trier of fact had to decide upon as a fact like any other fact. And we emphasise that the issue whether DW10 signed exh P51 before Mr Kala Singh or someone else is collateral to the main issue, namely, whether he set fire to the warehouse on the instructions of Captain Balasingam. H I

[37] The test for determining whether cross-examination on a collateral issue is permissible was recently considered in two cases of high authority. The first is *Nicholls v The Queen* [2005] HCA 1, which was decided on 3 February 2005 and where the facts were these. The appellant was charged for murder. One Davis who was an accomplice to the crime had agreed to give evidence for the prosecution. At his trial the appellant sought to adduce in evidence a conversation that someone called Ross had had with Davis. It had to do with the evidence that Davis would give at the trial. Counsel informed the trial judge that Ross would say that Davis had told him that he was involved in the murder but that neither the appellant nor his co-accused was involved in the victim's death. Davis had also told Ross that he would give evidence implicating Nicholls and Coates in the murder because the police had offered him a deal if he did so. Counsel for the appellant sought to lead this evidence as an exception to the collateral evidence rule. The trial judge ruled the proposed evidence to be inadmissible and the Court of Criminal Appeal of Western Australia upheld that ruling, Miller J holding that the evidence sought to be led from Ross was collateral and did not go to a fact in issue or a relevant issue. On further appeal, the High Court of Australia by a majority upheld the ruling of inadmissibility. In his dissent, McHugh J set out the rule and the test for determining its applicability. There are two passages in his judgment which we find useful in the present context.

[38] They are at paras 37 and 38 of the report and read as follows:

> [37] The central thesis of the common law concerning the admissibility of evidence is that it is admissible only when it is relevant, that is (*Goldsmith v Sandilands* (2002) 76 ALJR 1024 at pp 1029–1030):
>
> > if it tends to prove a fact in issue or a fact relevant to a fact in issue. A fact is relevant to another fact when it is so related to that fact that, according to the ordinary course of events, either by itself or in connection with other facts, it proves or makes probable the past, present, or future existence or non-existence of the other fact.
>
> In other words, evidence is relevant 'if it could rationally affect, directly or indirectly, the assessment of the probability of the existence of a fact in issue in the proceeding *(Goldsmith* (2002) 76 ALJR 1024 at p 1025).
>
> In a trial, a balance must be struck between considerations of justice and matters of practicality. Consequently, the general rule concerning admissibility is qualified by other rules of evidence. One qualification concerns evidence of matters collateral to the issues in the case.
>
> [38] The collateral evidence rule declares that answers given by a witness to questions put to him or her in cross-examination concerning collateral matters are final. Those answers cannot be contradicted or rebutted by other evidence *Cross on Evidence* (7th Aust Ed, 2004) at p 573 [17580]. Hence, the rule is often referred to as the 'finality' rule. Collateral facts are 'facts not constituting the matters directly in dispute between the parties' (*Piddington v Bennett and Wood Pty Ltd* (1940) 63 CLR 533 at p 546) or 'facts that are not facts in issue or facts relevant to a fact in issue' (*Goldsmith* (2002) 76 ALJR 1024 at p 1030). *In most cases, a fact that affects the credibility of a witness is a collateral fact. Hence, an answer given by a witness to a matter that relates to credibility alone — in other words, a collateral matter — is final and cannot be rebutted.* (Emphasis added.)

[39] The other authority is *O'Brien v Chief Constable of South Wales Police* [2005] UKHL 26; [2005] 2 All ER 931 which is an important decision on the admission

of similar fact evidence in civil proceedings. There, Lord Phillips of Worth Matravers (now Lord Chief Justice) quoted with approval the following two passages in the judgment of Lord Lane in *R v Edwards* [1991] 2 All ER 266:

> (i) The test is primarily one of relevance, and this is so whether one is considering evidence in chief or questions in cross-examination. To be admissible questions must be relevant to the issue before the court. Issues are of varying degrees of relevance or importance. A distinction has to be drawn between, on the one hand, the issue in the case upon which the jury will be pronouncing their verdict and, on the other hand, collateral issues of which the credibility of the witnesses may be one. Generally speaking, questions may be put to a witness as to any improper conduct of which he may have been guilty, for the purpose of testing his credit. (See [1991] 2 All ER 266 at p 273, [1991] 1 WLR 207 at p 214.)
>
> (ii) The distinction between the issue in the case and matters collateral to the issue is often difficult to draw, but it is of considerable importance. *Where cross-examination is directed at collateral issues such as the credibility of the witness*, as a rule *the answers of the witness are final and evidence to contradict them will not be permitted* (see Lawrence J in *Harris v Tippett* (1811) 2 Camp 637 at p 638, 170 ER 1277 at p 1278). The rule is necessary to confine the ambit of a trial within proper limits and to prevent the true issue from becoming submerged in a welter of detail. (See [1991] 2 All ER 266 at p 274, [1991] 1 WLR 207 at p 215.) (Emphasis added.)

[40] For completeness, we would add that the finality rule is to be found in s 153 of our Evidence Act. That section and the first two illustrations to it which we think are helpful read as follows:

> When a witness has been asked and has answered any question which is relevant to the inquiry only so far as it tends to shake his credit by injuring his character, no evidence shall be given to contradict him; but if he answers falsely he may afterwards be charged with giving false evidence.
>
> *Exception 1*— If a witness is asked whether he has been previously convicted of any crime and denies it, evidence may be given of his previous conviction.
>
> *Exception 2*— If a witness is asked any question tending to impeach his impartiality and answers it by denying the facts suggested, he may be contradicted.
>
> *ILLUSTRATIONS*
>
> (a) A claim against an underwriter is resisted on the ground of fraud. The claimant is asked whether in a former transaction he had not made a fraudulent claim. He denies it. Evidence is offered to show that he did make such a claim. The evidence is inadmissible.
>
> (b) A witness is asked whether he was not dismissed from a situation for dishonesty. He denies it. Evidence is offered to show that he was dismissed for dishonesty. The evidence is not admissible.

[41] The section was considered in two cases of importance. The first is *Bhogilal v Royal Insurance Co Ltd* AIR 1928 PC 54. In that case Lord Blanesburgh said:

> To Mehta when he was called, these matters were put in cross-examination. He denied them all. It was put to him also that in connexion with the preliminary police inquiry he had attempted to bribe the butler of the District Magistrate. It was suggested to him further that, in conversation with one Lalu Misser, he had stated that the whole case of the appellants was

A a swindle. When the case for the respondents was reached, they sought to contradict all these denials of Mehta by substantive evidence, adduced under s 155 (3), Evidence Act. The learned judge permitted them so to do by calling Bhattacharjee, the respondents' manager at Rangoon, the District Magistrate's butler, and Lalu Hisser. The last denied that Mehta had ever made any such statement to him; the others supported the stories which Mehta had denied. The learned judge found that in these last denials Mehta had lied, and
B he accordingly refused to consider his evidence at all. Upon this two questions arise for discussion. The first is whether the evidence in rebuttal was properly admitted. Their Lordships are not prepared to hold that the evidence of Bhattacharjee and the respondents' manager on this issue was not properly received, but they think the section was stretched beyond its true purport in admitting the evidence of the butler and Lalu Misser. *Sections 153 and 155, Indian Evidence Act, must, in their Lordships' judgment, be strictly*
C *construed and narrowly interpreted* if the courts governed by that statute are to be spared the task in many suits of prosecuting, on most imperfect material, issues which have no bearing upon that really in contest between the parties. Section 153 does not go far beyond, if it goes at all beyond, the case of *AG v Hitchcock* [1847] 1 Ex 91; 154 ER 38, on which doubtless it was based. (Emphasis added.)

D

[42] We note their Lordships' observation that ss 153 and 155 (c) must be read strictly and narrowly. Had the learned judge done precisely that, we have no doubt in our minds that he would have excluded evidence of Mr Kala Singh altogether.

E **[43]** The other case is *Vijayan v State* AIR 1999 SC 1311 which establishes the proposition that the law that s 153 enacts is the same as English law. In that case, Thomas J said that s 153 —

... is based on the decision rendered by Pollock CB in *Attorney General v Hitchcock* (1847) 1 Ex 91, in which the learned judge observed that 'a witness may be contradicted as to
F anything he denies having said provided it be connected with the issue as a matter capable of being distinctly given in evidence, or it must be so far connected with it as to be a matter which, if answered in a particular way, would contradict a part of the witness's testimony, and if it is neither the one nor the other of these, it is collateral to though in some sense it may be considered as connected with, the subject of enquiry.' The rule limiting the right to call evidence to contradict a witness on collateral issues excludes all evidence of facts which
G are incapable of affording any reasonable presumption or inference as to the principal matter in dispute.

[44] Now, for the present case. The purpose of admitting Mr Kala Singh's evidence was to show that DW10 was not a truthful person, a collateral issue going to his
H credibility. This is squarely caught by the finality rule encapsulated in s 153. As such it is our judgment that the learned judge ought not to have allowed the collateral evidence of Mr Kala Singh about the execution of exh P51 to form part of the impeachment proceedings as it had no relevance whatsoever to the facts in issue in this case.

I **[45]** There is another aspect to this part of the case that is of critical importance. It is this. If impeachment proceedings are contemplated, there must be strict adherence to the procedure laid down by s 145(1) of the Evidence Act 1950. If it is intended to contradict a witness by the writing which it is said to be his previous inconsistent statement, his attention must, before the writing can be proved, be called

to those parts of it which are to be used for the purpose of contradicting him. Now, if you apply that to exh P51 you will find that it simply does not fit. The affidavit of service cannot be even remotely classified as a previous inconsistent statement. All it said was that DW10 had served the writ on the appellant. And DW10 did not say anything during the trial to contradict that version. So it did not contain any material with which the respondent intended to confront DW10 with as a previous inconsistent statement. Hence, for this reason also, the learned judge ought not to have admitted Mr Kala Singh's evidence.

[46] We may add that we find a parallel example to the present in the case of *Wood v Van Rensburg* [1921] CPD 36. That was an action for debt. The defendant in cross-examination directed against his credibility denied that he was not legally married or that he was in possession of firearms without a permit. The magistrate admitted evidence taken by means of interrogatories contradicting the defendant's answers on these points. He then gave judgment for the plaintiff. It was held that the magistrate was wrong in admitting the evidence in question. Watermeyer JA said:

> …when evidence was allowed to be given on interrogatories to contradict the defendant upon a point which was quite immaterial to the suit I think that was an irregularity, and if this inadmissible evidence influenced the mind of the magistrate, and induced him to disbelieve the defendant upon a material point of fact, then I think that would be such a grave prejudice that it would give grounds for an appeal.

[47] Here too, as you can see from the passage already quoted from the judgment under appeal, the mind of the learned judge was influenced by the evidence of Kala Singh upon the collateral issue of whether DW10 signed exh P51 in the former's presence which had no bearing whatsoever upon the main issue in this case, namely, whether DW10 set fire to the respondent's warehouse on Captain Balasingam's instructions. And that was one of the grounds for his disbelieving DW10. This is accordingly a case where prejudice has been occasioned to the appellant.

[48] True that there was no objection to the evidence of Mr Kala Singh. But that is neither here nor there. Even in civil cases, inadmissible evidence remains inadmissible absent any objection. In *Malaysia National Insurance Sdn Bhd v Malaysia Rubber Development Corporation* [1986] 2 MLJ 124, Lee Hun Hoe CJ (Borneo) said:

> Objection should have been taken to the evidence of DW1. Hearsay evidence which ought to have been rejected does not become admissible merely because no objection was taken earlier.
>
> The authorities are clear on this. Perhaps, it is only necessary to cite *Sarkar, Law of Evidence*, (13th Ed) at p 51 which reads:
>
> > An erroneous omission to object to evidence not admissible or relevant under the Act does not make it admissible. It is the duty of the court to exclude all irrelevant or inadmissible evidence even if no objection is taken to its admissibility by the parties …

[49] For the reasons we have given, we find the impeachment of DW10 to be fatally flawed. In our judgment, the learned judge ought not to have held DW10's

evidence to be worthless on material points. He ought to have critically analysed his evidence, treating it with caution, but applying to it the usual tests that a court applies when undertaking a judicial appreciation of evidence. In our judgment, the first question that the learned judge ought to have asked himself is whether the story told by DW10 was probable in the light of all the surrounding facts and circumstances, including the patent falsity in the respondent's case that the fire broke out at 4pm and not earlier. This is a matter we will have to return to after a consideration of some of the other evidence produced at the trial.

[50] We realise that we have spent considerable time on this part of the case. It is because the error that the learned judge fell into was of a fundamental nature in the judicial assessment of the evidence of an important witness in relation to the facts of this case.

[51] The other arsonist was DW37. His evidence in chief is more or less the same as DW10. He was also confronted with a statutory declaration (exh D76) which was inconsistent with his evidence in court. This is what the learned judge said about DW37's evidence:

> Matthew Selvarajah — (DW37), more or less gave evidence in court similar to DW10, in that he was entrusted together with DW10 by Mr Balasingam, to set fire to the warehouse on the morning of 11 September 1989. An application was made by the plaintiffs' counsel to impeach the credit of this witness as regard to his evidence in court vis a vis the contents of a statutory declaration that he made — (D76).
>
> Having studied the contents of his statutory declaration — (D76), I allowed the application to impeach as I found that there were material contradictions between the evidence of DW37 in court and the contents of D76.
>
> In his evidence in court, DW37 stated that he in fact was instructed by Mr Balasingam to set fire to the Sitiawan warehouse on 10 September 1989 where else in the statutory declaration of D37, he stated that on 10 September 1989, he was in Ipoh at Mr Balasingam's house between 10.30pm to 10.45pm. When asked for an explanation, DW37 stated that he admitted making the statutory declaration but did so by Mr Balasingam on his instruction. He admitted that all the contents of his statutory declaration were false.
>
> This witness also admitted in court that he had given four to five false statements to the police in regard to the incident, and also admitted candidly that he was not an honest witness.
>
> I found his explanation in regard to the material contradictions to be totally unsatisfactory. As such, I hold that his evidence stands impeached.
>
> Since the evidence of DW10 and DW37 have been held to be impeached, I attach no weight to their evidence, and hold them to be totally unreliable.

[52] You will see from the foregoing passage that the learned judge set out DW37's explanation as being that he made the statutory declaration on Captain Balasingam's instructions. But that is not the explanation given by the witness. His explanation was that he made the false statements because he wanted to protect Captain Balasingam. Unfortunately, that explanation was never considered by the learned judge. The explanation he considered and rejected was one that was not given by

DW37. Under these circumstances, as an appellate court we are unable to accept as correct, the assessment by the learned judge of this witness' evidence. Because it does not accord with the judicial appreciation of evidence.

[53] In our judgment, the correct approach to the judicial assessment of evidence in a case where a witness has been contradicted by his or her previous inconsistent statement is to treat the whole of the evidence of that witness with caution. But the judge must consider and accept or reject, for good reasons, the explanation given by the witness for the inconsistency. He may accept the whole or parts of the witness' evidence as inspires confidence in him as having a ring of truth for one or more reasons. For example, the evidence in question or parts of it may be consistent with the probabilities of the case or with other irrefragable evidence. Or the judge may, after paying careful attention to the demeanour of the witness, feel assured that his evidence in court is consistent with the probabilities of the case and is the truth. This is the approach adopted by Raja Azlan Shah J (as His Highness then was) in *Ratna Ammal v Tan Chow Soo* [1966] 2 MLJ 294, an approach affirmed by the Judicial Committee of the Privy Council in *Tan Chow Soo v Ratna Ammal* [1969] 2 MLJ 49. The relevant passage in the judgment of his Lordship reads (at p 297):

> Fourthly, it was contended that Lee Yim Wah's evidence is contradicted by his own statutory declaration (exh P10). I admitted the declaration as a previous statement. I am satisfied that he made the declaration before the commissioner for oaths at Penang. The praecipe confirms this. The commissioner is now dead, but it was proved to my satisfaction that the signature is his. *In this court Lee Yim Wah has retracted the contents of his declaration at his own peril. However that may be, it should not invariably be a reason for rejecting an explanation.* He explained that when the declaration was brought to him by Ratnavale it had already been prepared by him at his solicitor's office in Ipoh. Ratnavale told him that as he was always going to Jakarta his declaration would facilitate him to sue the defendant in the present case. *In my view, that declaration was made in contemplation that he would not be made available as a witness in the present case.* Since he was a witness in the present case his declaration may only be used as a previous statement. *In the light of his explanation I have therefore to consider his whole evidence with caution.* (Emphasis added.)

[54] This concludes our discussion of the evidence of the arsonists, DW10 and DW37 and the way in which that evidence was dealt with by the learned judge. Now, it is our judgment that the learned judge should have accepted the evidence of DW10 and DW37 that the warehouse was set on fire on Balasingam's instructions and that this was not a case of spontaneous combustion as claimed by the respondent. Our reasons for this conclusion are as follows.

[55] First, their evidence is corroborated by and is consistent with the evidence of the independent eye-witnesses. The story of DW10 and DW37 is that they set fire to the warehouse in the very early hours of 11 September 1989. The fact that DW1, DW2 and DW3 saw the building burnt down in the early morning of 11 September 1989 confirms this.

[56] Second, their story that Balasingam played a dominant and active role in the whole affair is supported by the evidence of the respondent's own witness PW10 and also by DW11. We will be dealing with the evidence of these witnesses in a little

greater detail later in this judgment. Suffice to say for the present that both these are independent witnesses who testified about the conduct of Balasingam contemporaneous with the fire.

[57] Third, both DW10 and DW37 lack any motive for telling a lie that they were indeed the arsonists. Further, there is no motive for them to implicate Balasingam or for giving evidence adverse to the respondent. They freely admitted to the court that they were the arsonists and that they did what they did on Balasingam's directions. The question here is this: what did these two persons stand to gain by demolishing the respondent's claim that the combustion was spontaneous? They certainly did not stand to gain financially by claiming that the fire was not the result of spontaneous combustion. Neither is there any motive for causing financial loss to the respondent by depriving it of the insurance monies. And it is certainly not the respondent's case — for nothing of the sort was even remotely suggested to either of them — that DW10 and DW37 bore a grudge against Balasingam or the respondent. Indeed, it was DW10 whom the respondent used to serve the writ in this case. This was after the claim under the policy was rejected. So, if DW10 was still working for the respondent even after the fire, it appears consistent with a good relationship and not with any ill will.

[58] Fourth, the fact that DW10 and DW37 acted on the instructions of Balasingam is consistent with the probabilities of the case. The question here is whether these two persons — the arsonists — were persons who could have hatched the plan to set the warehouse on fire. The evidence on record confirms that the respondent's employees identified Balasingam with the respondent as though each was the alter ego of the other. That again is consistent with the very active and dominant role played by Balasingam in the taking out of the insurance and the great interest he showed in the matter as evidenced by his interaction with PW10 and DW11.

[59] To sum up this part of the case, there is no motive for DW10 and DW37 to say that the fire was caused by them and not the result of spontaneous combustion. Further, their evidence is consistent with the probabilities of the case. As such the learned judge's failure to accept their evidence on material points constitutes a serious misdirection that has occasioned a miscarriage of justice.

[60] We now turn to consider the evidence of the respondent's employees who are also material witnesses relevant to the issues in this case.

(iii) The employees' evidence

[61] These are DW5, DW9, DW13, DW15, DW23 and DW24. They gave evidence about the strewing of paper at the warehouse. Of them, the learned judge said as follows:

> A number of employees of the plaintiffs' company gave evidence namely DW5, DW9, DW13, DW15, DW23, and DW24. As for DW5, the gist of his evidence was that on 10 September 1989, he finished the rearrangement of stocks at the warehouse with other

employees at about 10pm to 11pm. After that some food and drinks were consumed by all present, and later he left for Ipoh with Mr Balasingam. The next morning, Mr Balasingam allegedly told him about the fire at the warehouse at about 10am. On arrival at the site, he saw the remains of the gutted warehouse. Later that evening, fire engines came to the site at about 4pm to 5pm.

This witness also assisted in drafting a report for Mr Purusothman — (DW23) to be lodged at the Sitiawan police station and went along with DW23 who then lodged a report accordingly. Under cross-examination, DW5 admitted telling a fire officer that the fire started at 4pm. He could not remember if he had told any other lies. He also admitted that prior to the fire, he had checked the contents of the warehouse, and wrote the details of stocks in a Stock Book. Further, he admitted the contents of the police report drafted by him for Purusothman — (DW23) were false. He also admitted telling lies to Professor Chan — (PW11) who had arrived at the site to conduct an examination. Further, he admitted giving false statements to the police about the time of the fire. He lied to the police even though he was not threatened, or paid any money, to tell a lie. He was aware it was an offence to tell a lie.

To sum up, Ho Wai Fook — (DW5) made false statement to the police in regard to the facts surrounding the fire that occurred at the warehouse. Witness also lied on oath in criminal proceedings at the sessions court relating to a criminal case. Finally, this witness admitted telling the police that on 11 September 1989, he spent the morning with Mr Balasingam and arrived in Sitiawan around 3pm to 4pm and that the fire started at 4pm on that date.

Mr Purusothman — (DW23) testified that Mr Muniandy — (DW31) a guard at the ASPM premises informed him about the fire on the morning of 11 September 1989 at about 6.30am. He then called Sugumaran Dass — (DW9), who then fetched DW23 in his car and both proceeded to the site. On arrival, he saw the gutted warehouse and then called Mr Balasingam and told him about the fire. Mr Balasingam arrived at the site at about 10am to 10.30am together with Mr Ho Wai Fook — (DW5). Later at 3.30pm, Mr Balasingam told DW23 to call the Bomba which DW23 complied with.

Later DW23 lodged a police report at Sitiawan police station — (P62). DW23 claimed that the report was false, although he knew it was an offence to make a false report. This witness admitted making a number of false statements to the police, and also admitted lying to Mr Lum Siew Wai — (DW27).

Mr Sugumaran Dass — (DW9) was a former site supervisor for the plaintiffs' company. He stated that on the night of 10 September 1989 he had, on the instruction of Mr Balasingam helped to strew paper at the warehouse together with other employee and that he later returned home. He first came to know about the fire from Mr Purusothnam — (DW23) who informed him about the fire on 11 September 1989 between 6.30am and 7am. They then proceeded to the site and then he noticed that the warehouse had been gutted and saw smoke and ash. Mr Balasingam was informed and he later arrived at the site at about 10am to 11am with Ho Wai Fook — (DW5). On 12 September 1989, he accompanied Mr Purusothman — (DW23) to lodge a report at Sitiawan police station. In the report he stated that the fire was detected at 4pm on 11 September 1989, that he alleged was false. This witness admitted making a false statement to Sgt. Abdullah of Sitiawan police, and also signed the statement. He confirmed of his lying spree to Insp Wan Badrul although he was warned to tell the truth. He also gave further false statement to the police at Bukit Aman, Kuala Lumpur. He admitted that Mr Balasingam was a good employer and did not lodge any report against him for threatening him. He even admitted lying to Professor Chan — (PW11) when he told him that the fire started on 11 September 1989 at 4pm.

Mr Radhakrishnan — (DW24) was a gardener employed at plaintiffs' company. He testified that he also helped to scatter paper at the warehouse on the night of 10 September 89.

A The following morning, he went to work at about 7.30am. to 8am. and noticed the gutted warehouse. The witness under cross-examination was referred to a statutory declaration — (D65) affirmed by him. He admitted that he signed the statutory declaration in the presence of a commissioner for oaths TWT1 —Mr Jeganathan. DW24 denied knowing the contents of D65 when he signed the document, and neither was he worried or concerned about what the document was all about.

B Counsel for the plaintiffs then applied to impeach the credit of this witness and asked the court to look at the contents of the statutory declaration — (D65). Having examined D65, the court found that there were material contradictions between the evidence of this witness in court and the contents of D65, and allowed the application. Upon being questioned about the contents of D65 where the witness stated that when he left the site at 4pm on
C 11 September 1989, he saw the warehouse and site office of ASPM and did not see any fire or smoke coming out from the warehouse and the site office. Witness stated that the contents of D65 was not his.

Counsel for the plaintiffs then applied to impeach the credit of this witness and asked the court to look at the contents of the statutory declaration — (D65). Having examined D65, the court found that there were material contradictions between the evidence of this witness
D in court and the contents of D65, and allowed the application. Upon being questioned about the contents of D65 where the witness stated that when he left the site at 4pm on 11 September 1989, he saw the warehouse and site office of ASPM and did not see any fire or smoke coming out from the warehouse and the site office. Witness stated that the contents of D65 was not his.

E Upon examining the evidence of this witness as a whole, I found that there has been a total lack of explanation, in regard to the material contradictions, between his evidence in court, and the contents of his statutory declaration, and I found his explanation to be wholly unsatisfactory. As such, I rule that the evidence of this witness is impeached, and he is no longer worthy of credit.

F Mr Subramaniam s/o Maruthamuthu — (DW13) gave evidence to the effect that at the material time, he was working as a driver for Mr Balasingam. He remembers seeing a fire, but did not remember whether it was in the afternoon or evening. On the day in question, he went to the ASPM premises with Mr Balasingam and Mr Ho Wai Fook and on arrival, he noticed that the warehouse had burnt down. The previous day prior to the fire, he had gone to Pusing with Mr Balasingam where he met a male named Willy and another male
G Indian. He also later proceeded to the ASPM premises where he saw a security guard — Muniandy (DW31) and some workers arranging papers. Later at about midnight, he returned to Ipoh with Mr Balasingam and Mr Ho Wai Fook. Under cross-examination, witness admitted having made a statutory declaration — (P52) affirmed before Mr Jeganathan TWT1 — a commissioner for oaths. He was not sure if the contents were explained to him by Mr Jeganathan. However, he added that if the commissioner for oaths
H stated that the contents had been explained to him, it might very well be true.

In any event, the gist of P52 is that on the morning of 10 September 1989, witness drove Mr Balasingam to a friend's house and a supermarket. The evening at 6.30pm, he drove Mr Balasingam to a temple, and later to a supermarket and left Mr Balasingam at his house at 10pm.

I On 11 September 1989 at 2pm he was in Ipoh and at 2.15pm he drove Mr Balasingam and Ho Wai Fook — (DW5) to Sitiawan to the premises of ASPM. On arrival there, he saw two fire engines attending to a fire at the warehouse. His evidence in the statutory declaration — (P52) contradicts flatly his evidence given in court. He also confirmed that maybe what he had stated in the first police statement was substantially, the same as what he had stated in the statutory declaration — (P52). I found the evidence of DW13 to be totally unreliable

in view of the many contradictions in his evidence, bearing in mind the contents of P52. Sinniah s/o Dharuman — (DW15), testified that in 1989 he worked as a general worker at the ASPM. He stated one morning he reached his place of work and saw smoke and fire emanating from the warehouse. He stated that the previous evening, he and some workers scattered some papers in the warehouse on the instruction of Mr Balasingam.

After the business of scattering the papers was over, food and drinks were served to all present including a male Chinese who had asked to spend the night at the site. The witness also saw the guard Muniandy — (DW31) holding his head with his hands and was vomiting. DW15 admitted making a statutory declaration — (P67) before a commissioner for oaths — Mr Jeganathan (TWT1) but stated that Mr Jeganathan did not translate the contents of the statutory declaration to him. Plaintiffs' counsel applied to the court to impeach the credit of this witness by asking court to view the statutory declaration.

After having viewed the contents of statutory declaration, I was of the view that there were material contradictions in the evidence of this witness in court *vis a vis* the contents of the statutory declaration and allowed plaintiffs' counsel to proceed.

When asked to explain the discrepancies between his evidence in court and the statement in P67, witness stated that the contents in P67 were not true. In fact in P67, witness had stated on 11 September 1989, he was sitting in the porch of the site office when he saw smoke followed by fire coming from the warehouse.

Mr Jeganathan — (TWT1) was called by defendants' counsel (in a trial within a trial) to ascertain the facts surrounding the recording of P67. He stated quite emphatically that P67 was signed by DW15 in his presence, and that he explained its contents to DW15 who understood the contents of P67 and signed it in the presence of Mr Jeganathan. DW15 did not give a satisfactory explanation as to the material contradictions in his evidence in court vis a vis the contradictory statement in P67. As such, I rule that his evidence stands impeached and I place no reliance on his evidence.

Another former employee of ASPM, Mr Nithi Anandarajan — DW16 stated in his evidence that he had no personal knowledge in regard to the details of the stocks of paper kept in the ASPM warehouse in Sitiawan as he had never been there. As such, his evidence is of little value.

After having perused the evidence given by DW5, DW9, DW13, DW15, DW23 and DW24 and for reasons stated above, I hold as a fact that their evidence is unreliable and unsafe.

[62] With respect, we are unable to accept the learned judge's assessment of the witnesses DW5, DW9, DW13, DW15, DW23 and DW24 as a proper evaluation on the facts of this case. We do not consider it necessary to discuss each of their evidence to demonstrate the error into which the learned judge fell. We will, at the appropriate place in this judgment, set out our reasons for our views on this part of the case. For the present it suffices to discuss the evidence of DW5 by way of example only. He is an important witness. The main points in his evidence in chief are as follows. He was the financial controller of the respondent. He holds a degree in business administration from the Acadia University of Nova Scotia. When he joined the respondent he reported to Balasingam whom he described as the head of the company. He testified that he and several other workers had scattered paper about inside the warehouse in the presence of Balasingam. This was on the night of 10 September 1989, at about 10pm to 11pm. After having scattered the paper, DW5 and the others gathered in the open area. He confirmed that the security guard

Munniandy was there; that they all had refreshments; that Munniandy felt dizzy and was taken into a container to rest. Later, at about 12.30am on 11 September 1989, this witness was sent home by Captain Balasingam. On 11 September 1989, Balasingam fetched DW5 to the warehouse and on the way told him that there had been a fire there. When they arrived at the scene, at about 11am, DW5 saw that the warehouse had burned down. On the following day (12 September 1989) this witness accompanied Balasingam to the Fire Brigade Station at Sitiawan. DW5 made a report about the fire. The report was made to DW11 (Abu Yazid bin Siran), the Assistant Supervisor of the Fire Department at Sitiawan. It was reduced into writing. It is exh D16. In exh D16, the time of the fire is stated as 1400 hours or 2pm on 11 September 1989. Later, DW5 accompanied Balasingam to the Fire Brigade Station at Ipoh. There they met PW10 (Yahya bin Yeop), the Operations Officer. At Balasingam's behest some amendments were made to D16. The time of the fire was amended to 1600 hours or 4pm. The statement in D16 that the building had caught fire and collapsed was changed to read that the building was in the process of collapsing.

[63] Under cross-examination, DW5 agreed that he had lied to the Fire Brigade, to the police and to the chemist, Professor Chan. He had made three false statements to the police. In his first statement, he had provided Balasingam with an alibi. He knew that it was an offence to give a false statement to the police. He gave an explanation as to why he had lied to the police. He had lied because Balasingam asked him to lie. He had lied because of his loyalty to Balasingam and also because he was afraid to lose his job. He had later decided to tell the truth in the fourth statement recorded by the police. He had given evidence before the sessions court at Balasingam's trial on a charge of mischief by fire. He agreed that he had admitted to that court that he had made three false statements to the police. In re-examination he said that his evidence before the sessions court was the truth.

[64] Now, our first comment about the learned judge's appreciation of the evidence of DW5 is that he either misread or seriously misunderstood an important part of this witness' testimony. To recall, this is what the learned judge said:

> Witness also lied on oath in criminal proceedings at the sessions court relating to a criminal case.

[65] This is plainly wrong. What DW5 actually said was that he had admitted in the sessions court proceedings that he had made three previous false statements to the police. But he had, as already noted, confirmed in re-examination that he had told the sessions court the truth.

[66] Our second comment is this. Nowhere in his judgment has the learned judge discussed the explanation given by DW5 for making false statements to the police. To recall, the witness had said that Balasingam had asked him to lie and that he had repeatedly lied out of loyalty to Balasingam and in fear of losing his job. This may or may not have been a reasonable or acceptable explanation. But the learned judge was nevertheless duty bound to consider it and to accept or to reject it for good

reasons (see *Ratna Ammal v Tan Chow Soo*). In our judgment, the learned judge's failure to consider DW5's explanation is a serious misdirection which has flawed his rejection of DW5's evidence in whole.

[67] Now for our third comment. It is plain from the judgment of the learned judge that he simply rejected DW5's evidence instead of approaching it with caution and testing it against evidence of independent witnesses or unchallenged evidence. In particular, the learned judge failed to take the evidence of PW10 and DW11 into account when considering DW5's evidence. PW10's evidence is that Balasingam had met him on a few occasions with regard to exh D16 and that the amendments appearing in exh D17 were made at Balasingam's request. PW10 did not mention DW5 having requested any of the amendments. Neither was any attempt made by learned counsel for the respondent who appeared in the court below to extract any evidence from PW10 that DW5 had played a significant role in seeking the changes to exh D16. Indeed, the tenor of PW10's evidence shows Balasingam to have played the sole or dominant role in seeking the changes. This is consistent with the probability that DW5 was a mere obedient servant and acted on Balasingam's directions. There is an additional factor here which appears to have been overlooked by the learned judge. It is this. PW10 was the respondent's witness who gave evidence supporting the appellant's case on the role played by Balasingam. So, not only is the respondent bound by his evidence, the appellant may rely on that very evidence to support its case (see *M Ratnavale v S Lourdenadin* [1988] 2 MLJ 371.

[68] As for DW11, he is an independent witness. He said that on 11 September 1989, a male Indian whom he identified as Balasingam and another person (not DW5) met him at his office. Balasingam asked him what procedure would be followed if a fire occurred. We pause to say that we find it to be quite out of the ordinary that Balasingam should make such an inquiry on the eve of the fire. Yet the learned judge does not appear to have had any or any sufficient regard to this piece of evidence when evaluating DW5's evidence or indeed the whole of the respondent's case. Returning to the mainstream, it is DW10's evidence that Balasingam and DW5 met him at his office on 12 September 1989 with regard to the fire in question. The witness confirmed that he had signed exh D16 and that the description of the goods stored in the warehouse and its value were given both by Balasingam and DW5. But we note that exh D16 shows only DW5 as the provider of this information. He also confirmed that he had not made any of the amendments to exh D16 as reflected in exh D17. His evidence about the fire is that he said that there was a fire alarm at his station on 11 September 1989 at 4.39pm and that he arrived at the scene at about 4.50pm. He said that the building had already burnt down and collapsed. His opinion was that the fire did not start at 4.30pm but must have started at 2pm or even earlier.

[69] The other witness whose evidence is critical to the case and which appears to support DW5 is the security guard, DW31. But his testimony was not considered at all by the learned judge. His evidence is that he saw several workers scattering paper inside the warehouse on the night of 10 September 1989. Balasingam was present in the warehouse at that time. Later, at about 10pm, this witness was served with some food and Milo by Balasingam. After consuming the Milo he became drowsy and was

taken into a container. He did not remember anything after that and when he awoke he was at home with his wife. He did not return to work after that. We have read and re-read his evidence under cross-examination and find nothing in the way of serious damage to the story told in his evidence in chief. If the learned judge had considered the evidence of this witness he may have found him credible. If he did not find DW31's evidence credible he would have given reasons and we would have been in a position to examine the soundness of those reasons. As it stands we find the failure of the learned judge to take into account the highly relevant and corroborative evidence of this witness to leave a gap in his assessment of the facts and evidence. Doubtless the appellant has been deprived of the right to have the learned judge's view about one of its important witnesses. As such we are satisfied that there has been a non-direction by the learned judge on the evidence which amounts to a misdirection.

[70] We now come to the fourth comment we have to make about the learned judge's assessment of the evidence of DW5. When you look at the learned judge's reasons for rejecting DW5's evidence, you will see that he did not consider his motive for implicating Balasingam in the scheme to set fire to the warehouse. As we have already said earlier in this judgment, the motive of a witness to give evidence against a party is an important element that ought to be thrown into the balance when weighing the evidence of that witness. It is our judgment that the failure of the learned judge to do so when considering DW5's evidence flaws his rejection of that evidence and opens the door to appellate intervention.

[71] Our fifth and final comment is this. Here is a case where DW5 and other witnesses have expressly named Balasingam as having played the dominant role in setting fire to the warehouse. He was present in court and was identified by PW10. Yet he did not give evidence to rebut the allegations made against him by DW5 or to explain why he had approached PW10 and DW11. This failure of the respondent to call Balasingam as a witness must, on the facts of this case, be thrown into the balance when evaluating the evidence of DW5 and the other witnesses. The learned judge did not do so. He ought to have. In our judgment, this failure fatally flaws the learned judge's evaluation of DW5's evidence.

[72] For the foregoing reasons, the learned judge ought, after cautioning himself, to have accepted DW5 as a witness of truth as to the facts narrated by him in his testimony. And he ought, on the view we take of the matter, to have acted upon DW5's evidence. Had he done so, he would have found: (i) that DW5 and Balasingam did arrive at the scene at between 10am and 11am on 11 September 1989; and (ii) that at about that time the warehouse had already burned down.

[73] Much of what we have said in relation to the appreciation of DW5's evidence may be said of the learned judge's appreciation of the evidence of DW9, DW13, DW15, DW23 and DW24. Thus, there was, in our judgment, no or no sufficient consideration of the motive of each of these witnesses to give evidence adverse to the respondent. Also, the learned judge failed to test the evidence of these witnesses against the probabilities of the case and against the evidence of the independent witnesses, PW10, DW1, DW2, DW3 and DW11. Had he done so, he would have

found their evidence to be consistent with and corroborated by the independent witnesses. Where there were contradictions in the evidence of DW9, DW13, DW15, DW23 and DW24, he did not apply the salutary rule laid down by Thompson LP in *Khoon Chye Hin v Public Prosecutor* [1961] MLJ 105 (at p 107):

> If a witness demonstrably tells lies on one or two points then it is clear that he is not a reliable witness and as a matter of prudence the rest of his evidence must be scrutinised with great care and indeed with suspicion. To say, however, that because a witness has been proved a liar on one or two points then the whole of his evidence 'must in law be rejected' is to go too far and is wrong.

[74] In *Public Prosecutor v Datuk Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ 15, Raja Azlan Shah FJ (as His Highness then was) stated as follows (at p 19):

> There is no rule of law that the testimony of a witness must either be believed in its entirety or not at all. A court is fully competent, for good and cogent reasons, to accept one part of the testimony of a witness and to reject the other. It is, therefore, necessary to scrutinize each evidence very carefully as this involves the question of weight to be given to certain evidence in particular circumstances.

[75] The approach is no different in civil cases. In *Gulwant Singh v Abdul Khalik* [1964] MLJ 286, Gill J said (at p 287):

> It was urged upon me by Mr Mooney on behalf of the plaintiff that as the defendant had lied to the court as regards the amount actually lent to him, and in view of his denials that he had borrowed money from other moneylenders, I should reject his evidence. It is true that if a witness demonstrably tells lies the rest of his evidence must be treated with caution, and indeed I had that rule very much in mind, but in the face of all the other evidence I was driven to the conclusion that the payments as alleged by the defendant and his witnesses were in fact made. I was not forgetful of the fact that the defendant's witnesses rely upon him for their livelihood but that was no reason for me to brand them as liars.

[76] In *Satpaul v Delhi Administration* AIR 1976 SC 294 (quoted with approval by the Federal Court in *Dato' Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232) Sarkaria J said:

> It is for the judge of fact to consider in each case whether as a result of such cross-examination and contradiction, the witness stands thoroughly discredited or can still be believed in regard to a part of his testimony. If the judge finds that in the process, the credit of the witness has not been completely shaken, he may, after reading and considering the evidence of the witness, as a whole, with due caution and care, accept, in the light of the other evidence on the record, that part of his testimony which he finds to be creditworthy and act upon it.

See also, *Revella Sivaiah v State of Andhra Pradesh* [2005] Cr LJ 526.

[77] In *New India Assurance Co Ltd v Shakuntalabai* AIR 1987 MP 244, TN Singh J said:

> [A] witness cannot be branded a liar and his evidence discarded on the sole ground that a part of his testimony was not reliable.

[78] As may be seen from the passage in the learned judge's judgment quoted above, he rejected the evidence of DW9, DW13, DW15, DW23 and DW24 out of hand instead of treating them with caution because of the contradictions in their evidence. The failure of the learned judge to follow the approach to be adopted in the judicial appreciation of evidence laid down in the leading authorities discussed earlier in this judgment flaws his views on the credibility of DW9, DW13, DW15, DW23 and DW24 and entitles this court to treat the issue of credibility as being at large and to consider the matter afresh. Because, the failure to judicially appreciate the evidence of witnesses is a ground for appellate intervention (see *Karthiyayani & Anor v Lee Leong Sin & Anor*).

[79] In our judgment, a judge sitting alone must have regard to all the circumstances from which inferences may reasonably be drawn as to the accuracy or otherwise of a witness' evidence and in particular to the question whether he had any motive to conceal or misrepresent the facts in his testimony to the court (see *Ratna Ammal v Tan Chow Soo*). Where this is not done: where there is no judicial appreciation of the evidence of a witness — then an appellate court may intervene on the ground that the trial judge 'has not taken proper advantage of his having seen and heard the witnesses' (per Lord Thankerton in *Watt v Thomas* [1947] AC 484) or that he 'did not view the whole of the evidence objectively and from all angles' (*Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137). This, we are satisfied, is what happened here.

[80] We have read and scrutinised the evidence of DW9, DW13, DW15, DW23 and DW24 with much care and extreme caution. We have tested each of their evidence against the evidence of the independent witnesses and against the probabilities of the case. We have searched the record for any possible motive that these witnesses may have to give evidence against the respondent. Having done all this, we have come to the conclusion that their evidence on material particulars has the ring of truth and should have been accepted by the learned judge. There are two main points on which the evidence of these witnesses is relevant and material. First, on the fact that they scattered paper in the warehouse. Second, that the fire did not occur either at 2pm or 4pm on 11 September 1998 but much earlier in the morning of that day.

THE STANDARD OF PROOF

[81] We now turn to consider the issue of the standard of proof which the learned judge imposed upon the appellant when requiring them to satisfy him that the respondent's claim was fraudulent. This is what the learned judge said:

> In raising the issue of fraud on the part of the plaintiffs, the burden of proof on the defence is that of proof beyond reasonable doubt. Refer to the case of *Eastern & Oriental Hotel* (1957) Sdn Bhd v Ellarious George Fernandez & Anor [1989] 1 MLJ 35 when Lee Hun Hoe CJ (Borneo) stated that the onus of proof of fraud is proof beyond reasonable doubt. In the case of *Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors* [1983] 1 MLJ 81 the court also held that the onus is upon a person alleging fraud to prove fraud, not on a balance of probabilities, but beyond reasonable doubt.

Bearing the salutary principles enunciated in the above mentioned cases, and having examined the evidence as a whole adduced at the trial, I hold as a fact that the defendants have failed to prove fraud against the plaintiffs beyond reasonable doubt. There may be suspicion that the fire was self-induced by the plaintiffs, however, fraud must be established beyond all reasonable doubt. It cannot be based on suspicion and conjecture. See the case of *Hansraj Gupta & Ors v Dehra Dun-Mussoorie Electric Tramway Co Ltd* AIR 1940 PC 98 and *ALN Narayanan Chettyar & Anor v Official Assignee High Court Rangoon & Anor* AIR 1941 PC 93.

The evidence of defendants' witnesses was based on photographs and other documents, and therein lies the weakness in their evidence. However the plaintiffs' counsel contends that defendants are estopped from pleading fraud, as it was not a ground on which the defendants repudiated liability. The defendants repudiated liability for breach of condition 11 and 12 of the policy.

Although the defendants called witnesses to show that Mr Balasingam planned to set fire through his employees to the warehouse at the material time, the evidence tendered in court is not only tainted but totally unreliable, and I hold as a fact that there is no independent witness who could shed any light as to how the fire started at the warehouse at the material time and date.

[82] Learned counsel for the appellant has submitted that this is a case concerning the submission of a false claim to the appellant insurance company. Accordingly, it is one of fraud which is civil in nature which need only be established on a balance of probabilities. The learned judge therefore misdirected himself on the issue of fraud. We were referred to the decision of the Federal Court in *Ang Hiok Seng @ Ang Yeok Seng v Yim Yut Kiu (Personal Representative of the Estate of Chan Weng Sun, deceased)* [1997] 2 MLJ 45. That was a case in which it was contended that a purported option was obtained by fraudulent means. Fraud and other alternate defences were raised by the defendant in his pleaded case. Mohd Azmi FCJ, after a careful discussion of all the relevant cases on the point (including those referred to by the learned judge in the instant appeal) said this in a now well known passage (at pp 59–60):

From the wide definition of 'fraud' under s 17 of the Contracts Act 1950 as well as leading authorities on the subject, where the allegation of fraud in civil proceedings concerns criminal fraud such as conspiracy to defraud or misappropriation of money or criminal breach of trust, it is settled law that the burden of proof is the criminal standard of proof beyond reasonable doubt, and not on the balance of probabilities. It is now well established that an allegation of criminal fraud in civil or criminal proceedings cannot merely be based on suspicion or speculation. … But where the allegation of fraud (as in the present case) is entirely founded on a civil fraud — and not based on a criminal conduct or offence — the civil burden is applicable.

[83] We would observe that the fraud alleged here is that the respondent was making a claim for destruction of its property by a fire caused by spontaneous combustion when in fact the property was destroyed in a fire that was self inflicted. Put in another fashion, what the respondent was saying to the appellant was this; 'My property was destroyed in a fire for which I was in no way responsible. So you must pay me under the policy I took out with you'. This is nothing more than a representation of a set of facts as being true. The appellant refused to pay because this, it said, was a fraudulent representation. The truth, according to the appellant is that

A the property was set fire to and destroyed on purpose. Now, when viewed in this way — and that is the way in which the learned judge ought to have viewed it — we are in agreement with the appellant's submission that this is a case of civil fraud and not criminal fraud. Accordingly, it is our judgment that the learned judge misdirected himself on the required standard of proof.

B

[84] Assume for a moment that we are wrong. Assume that the correct standard to apply in this case is the criminal standard of proof: that is, proof beyond reasonable doubt. Yet we are satisfied that on an objective assessment of the facts and having regard to the totality of the evidence in this case, there is sufficient evidence of C circumstances from which an inference of fraud may be drawn. Before we set out the relevant facts and circumstances here, we would state that in our judgement proof of fraud beyond reasonable doubt does not mean proof beyond any doubt or the shadow of a doubt. While mere suspicion is insufficient, it is not the law that a litigant who alleges fraud must unravel each and every act of the person accused of D fraud. Like any other fact, fraud may be inferred from circumstantial evidence with the added proviso that there must be a foundation of evidence and not mere suspicion. We would, in this context refer to *Satis Chandra Chatterji v Satish Kantha* AIR 1923 PC 73 where Lord Atkinson said:

> E Charges of fraud and collusion like those contained in the plaint in this case must, no doubt, be proved by those who make them — proved by established facts or inferences legitimately drawn from those facts taken together as a whole. Suspicions and surmises and conjecture are not permissible substitutes for those facts or those inferences, but that by no means requires that every puzzling artifice or contrivance resorted to by one accused of fraud must necessarily be completely unravelled and cleared up and made plain before a verdict can be properly found against him. If this were not so, many a clever and dexterous knave would F escape.

[85] In *Transport Industries Insurance Co Ltd v Longmuir* [1997] 1 VR 125, the insured had been acquitted on a charge of arson. Yet the insurance company refused to pay his claim. The circumstances there were that the insured's house was damaged G in a fire which had been deliberately lit. There was a large body of circumstantial evidence that the insured had lit the fire, including that he was on the property immediately before the fire started, that he had stored there a large amount of petrol, which had been used to start the fire, and that he was in the midst of a bitter matrimonial dispute which involved the property. The trial judge found for the H plaintiff insured. The defendant insurer appealed. The Court of Appeal of the Supreme Court of Victoria allowed the appeal, holding that the trial judge had erred in considering each item of circumstantial evidence in isolation from the others and seeking to determine whether the ultimate fact could be inferred from each such item of evidence. The following passages in the judgment of Winneke P are instructive:

I

> (i) It seems to me, however, that his Honour deprived himself of the opportunity of assessing the full impact of these evidentiary facts by engaging in a false process of reasoning. Rather than considering what inferences flowed from the combination of evidentiary facts which were not in contest, the learned judge appears to have treated each of the individual evidentiary facts as if it were the ultimate *factum probandum*; in the sense that unless, when analysed, it was capable by itself of supporting the inference

that the respondent was responsible for lighting the fire, it should be discarded without regard to the support which such fact might have received from other facts.

(ii) It was, in my view, an inevitable consequence of isolating the individual facts, and analysing each to determine whether it was consistent with proof of the ultimate fact that the respondent lit the fire, that the learned judge imposed upon the appellant an onus and standard of proof which was inappropriate in the circumstances. The task of the learned judge was to consider the weight of the combination of facts proved to his satisfaction and then to determine whether the combined weight of those facts and circumstances supported the inference, as a matter of probability, that the respondent lit the fire. The onus of proof is only to be applied at the final stage of the reasoning process. It is, erroneous to divide the process into stages and, at each stage, apply some particular standard of proof. To do so destroys the integrity of circumstantial case, as the Court of Criminal Appeal in South Australia pointed out in *R v Van Beelen* (1973) 4 SASR 353 at p 374: '... the requirement of proof beyond reasonable doubt relates to the final stage in the process; the jury is not... required to split up the various stages in the process of reasoning leading to the conclusion of guilt beyond reasonable doubt and to apply some particular standard of proof to each of those steps... and to instruct them to do so would... be confusing and possibly misleading and would tend to the imposition of an artificial and scholastic strait-jacket on their deliberations.

[86] We begin our discussion of the evidence in this case with a reminder of the learned judge's description of the value of the appellant's evidence. According to the learned judge:

(i) The evidence of defendants' witnesses was based on photographs and other documents, and therein lies the weakness in their evidence; and

(ii) there is no independent witness who could shed any light as to how the fire started at the warehouse at the material time and date.

[87] With respect, both these observations are not correct. The appellant's evidence before the High Court consisted of direct evidence of eye-witnesses and evidence of circumstances. There were witnesses as to how the fire started. Unfortunately, their evidence was not properly appreciated by the learned judge, a matter already dealt with earlier in this judgment.

[88] Now, here are the pieces of evidence — not mere conjecture — which when taken together and as a whole reasonably support the appellant's charge of fraud.

[89] First, there are the circumstances surrounding the increase in the value of the insured goods. Prior to 23 July 1989, the respondent had obtained cover from an insurance company called UPI for a sum of RM2.5m. Then, with effect from 23 July 1989, the respondent obtained cover for RM14.932m with Provincial and the appellant. A week later, on 30 July 1989, the amount of the insured value was suddenly increased from RM14m to RM32m. What made the goods become so valuable within a period of about a week?

[90] Second, when the policy of insurance was being negotiated, Balasingam insisted upon the inclusion of a spontaneous combustion clause for which extra premium had to be paid. He also insisted upon a condition that in the event of a loss,

A the adjusters must be appointed with the consent of the respondent and its brokers. PW3 described this as an extraordinary condition. This evidence is unchallenged. There is absent any explanation from the respondent as to why Balasingam insisted on these two matters.

B **[91]** Third, it is the respondent's case that the paper is question was security paper, a very valuable and expensive commodity. It is reasonable to expect the owner of such a commodity to provide tight security for it during its transportation. Yet, we find that no security was arranged when the paper was transported from Brickfields to the warehouse at Kampong Acheh, Sitiawan. The question that arises is this: was the paper really as valuable as claimed by the respondent?

C

[92] Fourth, this supposedly very valuable paper — worth RM32m — was stored in a wooden warehouse with a zinc roof. In the circumstances, is it not reasonable for the owner of such valuable property to have placed it within a better and stronger structure or premises?

D

[93] Fifth, the security for the warehouse — considering that it housed goods worth RM32m — consisted of only DW31 who was on duty only from 7pm to 7am. If the paper was truly worth RM32m, would it not be reasonable to expect the respondent to provide more guards to take care of it during the hours that the office

E was closed?

[94] Sixth, according to the evidence of DW5 and DW23, Balasingam briefed his employees to call him and no one else in the event of a fire. One would have thought that the first people that needed to be called were the Fire Brigade.

F

[95] Seventh, there is evidence that paper was being scattered in the warehouse in the presence of Balasingam on the day before the fire. The evidence of DW31, the guard, on this point was not challenged and his evidence was never considered. The question that naturally arises is: why scatter paper all over the warehouse,

G especially paper that was worth RM32m?

[96] Eighth, the warehouse had burned down at between 7am and 8am on the morning of 11 September 1989, according to the evidence of DW1, DW2 and DW3. Then, why did Balasingam want the time of the fire to be stated in D17 as

H 4pm?

[97] Ninth, on 11 September 1989, at about 2pm, Balasingam calls on DW11 at the latter's office in Sitiawan and asks him about the procedure to be followed in the event of a fire. By this time, the warehouse had already burned down. The evidence of the independent eyewitnesses DW1, DW2 and DW3 confirms this. There is no

I explanation from the respondent as to why the inquiry was made of DW11.

[98] Tenth, on the same day, ie, 11 September 1989 at 4.39pm Balasingam instructs DW23 to report the fire to the Fire Brigade Station at Sitiawan. DW11 confirms that at the time stated he received an alarm about the fire at the respondent's

warehouse. He despatches fire engines there to deal with the fire. On arrival, he finds that the building had collapsed. He estimates the time of the fire at 2.00 pm but agrees in evidence that it could have been earlier.

[99] Eleventh, DW11 prepares Exh D16 (the Fire Report) dated 12 September 1989. PW10 who is stationed at the Fire Brigade Headquarters in Ipoh is approached by Balasingam and at his request amends D16 by amending (i) the time of the fire from 2pm to 4pm and (ii) the description of the scene when the fire brigade arrived. There is no explanation from the respondent as to why this was done.

[100] Twelfth, an excavator is brought onto the site to transfer the evidence of the fire. On 12 September 1989, DW9, an employee of the respondent is instructed by Balasingam to get an excavator to stir up the ash to make sure that the papers were burnt. DW9 stops a passing excavator driven by DW12 and has the job done. This witness, DW9, finds a cigarette lighter at the scene and hands it to Balasingam. It is put to DW9 under cross-examination that he had asked for RM10,000 from Balasingam failing which he would lie against the latter. The witness denied this. But Balasingam was not called to say that such a demand had been made or that an excavator had never been called for.

[101] Thirteenth, there is the fact that statutory declarations were obtained from several of the respondent's employees in anticipation of litigation. No explanation was given by the respondent for having adopted this unusual course of action.

[102] Fourteenth, there is evidence of the respondent's impecuniousity. Although the respondent's paid up capital was supposed to be RM60–70m, it had no assets and was insolvent to the point that it was wound up by the court. There is evidence on record that the respondent was unable to pay even a debt of RM1m. The statement of affairs (exh D73) filed by the respondent's liquidator shows that its only asset was the contingent claim against the appellant and Provincial. The impecuniosity of the respondent at the material time is a relevant fact under s 8 of the Evidence Act 1950. It is strong evidence of motive. Thus, in *Preshyon v Cooperators General Insurance Company* (1991) 103 NSR (2d) 189 a claim was made for the loss of a car. The insurer repudiated liability on the ground that the claim was fraudulent. Roscoe J who tried the action said that the plaintiff's financial difficulties presented a "strong suggestion of a motive for their involvement in the theft of their car".

[103] When gathered together and considered as a whole, the circumstances set out above establish beyond a reasonable doubt that the fire was the result of an act of arson. There is no doubt in our minds that this is a case where the warehouse was intentionally set fire to by DW10 and DW37 acting on the instructions of Balasingam and that this was not a case of spontaneous combustion as alleged by the respondent. There is also no doubt in our minds that on the evidence considered as a whole it was Balasingam who planned the fire and its execution and that it was his intention to cause the respondent to make a false and fraudulent claim against the appellant. Here is a man who is repeatedly mentioned by more than one witness relating the part he played. The respondent's failure to call him although he was present in court (as may be seen from the notes of evidence) in the circumstances of

this case warrants the drawing of an adverse inference under s 114(g) of the Evidence Act 1950. It has been held by the Judicial Committee of the Privy Council in *Seth Maganmal v Darbarilal* AIR 1928 PC 39 that an adverse inference may be legitimately drawn against a party who fails —

> to call as his witness the principal person involved in the transaction, who was in a position to give a first hand account of the matters in controversy and throw light on them, and who could have refuted on oath the allegations of the other side …

[104] In our opinion, the learned judge fell into error in not considering the various items of circumstantial evidence outlined earlier in this judgment. Had he done so, he would have found that the combined strength of the several pieces of circumstantial evidence establish beyond a reasonable doubt that this was a case of arson. And he ought, in the final analysis thrown into the balance the adverse inference arising from the failure to call Balasingam.

[105] We may add that in arriving at our conclusion that there was fraudulent conduct in this case, we have throughout borne in mind the cautionary words of Lord Jenkins in *Akerhielm v De Mare*. This case is, on its facts, one in which the circumstantial evidence taken as a whole is so compelling that it has led us to the irresistible conclusion that the claim made upon the appellant was fraudulent.

ATTRIBUTION AND VICARIOUS LIABILITY

[106] Mr Mahendran, learned counsel for the respondent presented a careful and concise argument supporting the judgment. He submitted that even if the fire was caused by the willful act of persons acting on the instructions of Balasingam, or if he was himself guilty of any other misconduct, the respondent as a limited company was innocent. Further, it is not bound by his acts and may therefore claim under the policy notwithstanding condition 13 of the policy, the material part of which reads:

> If the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the Insured or any one acting on his behalf to obtain any benefit under this Policy; or, if the loss or damage be occasioned by the willful act, or with the connivance of the Insured … all benefit under this Policy shall be forfeited.

[107] In our judgment, the first set of critical words in condition 13 for present purposes are 'if the claim in any respect be fraudulent'. What condition 13 postulates is a fraudulent claim. On its proper construction the condition requires that there must be some fraud on the part of the respondent in making the claim. It refers to a fraudulent state of mind on the part of the respondent. In other words, an intention to deceive the appellant and by means of such deception to obtain payment of the insurance monies.

[108] The other set of critical words in condition 13 are 'acting on his behalf'. Was Balasingam 'acting on behalf' of the respondent when he did what he did? Mr Mahendran says he was not. He relies on the fact that Balasingam held a mere

5.28% of the shares of the respondent and was the chairman of the respondent's board. But he was not its managing director or its executive director. We must now deal with these two mutually exclusive state of affairs.

[109] As to the respondent's state of mind when making the claim, learned counsel submitted that applying the general rules of attribution to the facts of this case, any fraudulent state of mind on the part of Balasingam was not to be attributed to the respondent. This argument necessitates a consideration of the rules of attribution as applied to a limited company.

[110] There is no difficulty in ascertaining the state of mind of a natural person. If the law requires intention or recklessness as a basis of liability, then all the court does is to apply familiar tests to established facts to determine whether the particular act was done with the requisite intention.

[111] But difficulties do arise in the case of a non-natural person, such as a company, when it comes to ascertaining the state of its mind. Take the example already given. If intention, recklessness or other state of mind is the basis of liability, how do you determine that a company had the particular intention or recklessness? Unlike a human, a company has no mind the state of which can be determined with reference to its acts and omissions. It is to overcome this problem that the law has developed rules called the 'rules of attribution' whereby the state of mind of an officer of a company is attributed to the company. The simplest approach to the problem was that selected by Denning LJ in *HL Bolton (Engineering) Ltd v TJ Graham & Sons Ltd* [1956] 3 All ER 624 where he said this:

> A company may in many ways be likened to a human body. They have a brain and a nerve centre which controls what they do. They also have hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what they do. The state of mind of these managers is the state of mind of the company and is treated by the law as such. So you will find that in cases where the law requires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of the company. That is made clear in Lord Haldane's speech in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 at pp 713, 714. So also in the criminal law, in cases where the law requires a guilty mind as a condition of a criminal offence, the guilty mind of the directors or the managers will render the company themselves guilty. This is shown by *R v ICR Haulage Ltd* [1944] 1 All ER 691 to which we were referred this morning.

[112] In *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369, the Federal Court when referring to Denning LJ's approach said this (at p 385):

> We may add that we regard the symbolic representation alluded to by Denning LJ in *Bolton* as an over-simplification of the several rules, both statutory and common law, that go toward placing a company on the same footing as a natural person in the context of attributing to a corporation the acts done by its officers or their knowledge or state of mind upon any given matter.

A The Federal Court then referred to the Privy Council case of *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 All ER 918 where Lord Hoffmann said:

> The company's primary rules of attribution together with the general principles of agency, vicarious liability and so forth are usually sufficient to enable one to determine its rights and obligations. In exceptional cases, however, they will not provide an answer. This will be the case when a rule of law, either expressly or by implication, excludes attribution on the basis of the general principles of agency or vicarious liability.

[113] This is not an exceptional case. And we are of the view that the general principles of agency and vicarious liability are sufficient, on the facts of this case, to determine the point under discussion. As a general rule, the acts and omissions of a servant or agent of a natural person are attributed to that person when those acts are done in the course of employment. When operating in the sphere of the law of contract this is called the doctrine of agency and when operating in the sphere of tort law it is known as the doctrine of vicarious liability.

[114] There is no difficulty when applying the doctrine of vicarious liability to a company. If a driver or security guard employed by a company does some negligent act as a result of which a third party is injured, the same rules as apply to natural persons apply to the company. The test is whether the act or omission took place in the course of employment. In the case of contract, the issue is whether what the agent did was within the scope of his express or implied authority or if it was not, then whether it was ratified by the principal. So far as a company is concerned, although it is an entity separate and distinct from its shareholders, it can and often does act through agents and the act of its agent will bind it in the ordinary way.

[115] We now return to the question whether the respondent is bound by Balasingam's acts This calls for an examination of the role played by him in relation to the respondent company. In matters as this there is really no substitute for a meticulous examination of the facts. And these are the facts.

(i) At all material times, Balasingam was a substantial shareholder of the respondent. He held shares indirectly through another company in which he held a substantial financial interest. The annual report of the respondent confirms this to be the case.

(ii) The annual report carries a message from His Royal Highness the Sultan of Perak which describes Balasingam as the driving force of the respondent's project.

(iii) Balasingam attended the meeting held on 29 July 1989 at which the insurance policy was negotiated.

(iv) He took an active part in the events following the fire, such as calling on PW10 and DW11. In particular, he got the time of the fire and the state of the building changed as reflected in D17. This was specifically to help the respondent.

(v) He took an active part in matters relating to the claim under the policy. For example, he stopped the adjusters from coming onto the site.

(vi) He took an active part in the preparation of the stock book and having the entries in it verified by the appellant and the adjusters.

(vii) He attended a meeting held at the appellant's premises after the fire in order to submit the claim under the policy.

(viii) There was neither any contemporaneous nor subsequent disavowal by the respondent of Balasingam's right to represent it.

(ix) There is the evidence of at least one witness, DW5, that he regards Balasingam and the respondent as one and the same person.

(x) There is evidence on record showing that he was instrumental in obtaining statutory declarations favourable to the respondent's claim from several employees of the appellant. These statutory declarations were later used at the trial to cross-examine the appellant's witnesses for the purpose of discrediting them.

[116] If you take the foregoing pieces of evidence, not in isolation but as a whole and consider them together with the other evidence on record — and this is what we have done — they reasonably support the conclusion that Balasingam was at all material times acting on the respondent's behalf within condition 13 of the policy. He was acting on behalf of the respondent when he planned the destruction of the warehouse by having DW10 and DW37 to set fire to it. He was acting on behalf of the respondent when he went about getting the time of the fire and the state of the building changed in D17. And he was acting on behalf of the respondent when he caused the claim under the policy (exh P3) to be made on the false and fraudulent ground that the fire was the result of spontaneous combustion. The appellant was accordingly entirely justified in repudiating the policy in reliance upon condition 13.

[117] Other points of criticism of the judgment under appeal were addressed to us by the appellant. This includes a complaint that the learned judge was wrong in holding that the policy in question, exh P3 is a valued policy. By reason of the conclusion we have arrived at on the facts of this case, we find it unnecessary to address these other complaints. Suffice to say that there is merit in the argument that the policy in this case is not a valued policy based on the judgment of Siti Norma Yaakob J (now CJ (Malaya)) in *Thag Services Inc (M) Sdn Bhd v Capital Insurance Bhd* [1989] 2 CLJ 504.

CONCLUSION AND RESULT

[118] Having very carefully scrutinised the evidence in this case and having read and re-read the judgment under appeal, we are satisfied that the learned judge misdirected himself on the facts and evidence as discussed earlier in this judgment. To sum up, this was a case in which there was no judicial appreciation of the evidence of relevant and material witnesses. In consequence, there has been occasioned a substantial miscarriage of justice. It is therefore our duty as an appellate court to intervene in this case.

[119] For the reasons already given, this appeal must succeed. The orders of the High Court are hereby set aside. The respondent's suit is hereby dismissed. The respondent must pay the costs of this appeal and all costs incurred in the court below. The deposit in court shall be refunded to the appellant. We will now hear counsel on the orders that are to be made in the other appeals.

POSTSCRIPT

[120] We, Gopal Sri Ram JCA and Alauddin JCA (now FCJ) wish to add this postscript. This is the last judgment that we will be writing as a Bench. In a very short while, our learned brother Abdul Kadir Sulaiman JCA (now FCJ) will leave us, having reached the constitutional age of retirement. We shall sorely miss his company both on and off the Bench. Perhaps we may be permitted to recall and adopt *mutatis mutandis* the words of Lord Bridge of Harwich in *Ruxley Electronics and Construction Ltd v Forsyth* [1994] 3 All ER 801:

> My Lords, since the populist image of the geriatric judge, out of touch with the real world, is now reflected in the statutory presumption of judicial incompetence at the age of 75, this is the last time I shall speak judicially in your Lordships' House. I am happy that the occasion is one when I can agree with your Lordships still in the prime of judicial life who demonstrate so convincingly that common sense and the common law here go hand in hand.

Appeal allowed.

Reported by Loo Lai Mee